TEXAS REGISTER

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School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

ADOPTED RULES

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for October 8, 2009

Appointed as Justice on the Supreme Court of Texas, Place 9, for a term until the next General Election and until her successor shall be duly elected and qualified, Eva M. Guzman of Cypress. Justice Guzman is replacing Justice Scott Brister who resigned.

Appointments for October 12, 2009

Appointed to the Texas Forensic Science Commission for a term to expire September 1, 2011, Lance Evans of Fort Worth (replacing Samuel Bassett of Austin whose term expired).

Appointed to the Texas Forensic Science Commission for a term to expire September 1, 2011, Randall E. Frost of Boerne (replacing Sridhar Natarajan of Boerne whose term expired).

Appointments for October 14, 2009

Appointed to the Timothy Cole Advisory Panel on Wrongful Convictions, pursuant to HB 498, 81st Legislature, Regular Session, for a term at the pleasure of the Governor, Mary Anne Wiley of Austin.

Appointments for October 19, 2009

Appointed to the Jefferson and Orange County Board of Pilot Commissioners for a term to expire August 22, 2011, George W. Brown, III of Beaumont (reappointed).

Appointed to the Jefferson and Orange County Board of Pilot Commissioners for a term to expire August 22, 2011, Russell S. Covington of Orange (reappointed).

Appointed to the Jefferson and Orange County Board of Pilot Commissioners for a term to expire August 22, 2011, William F. Scott of Nederland (reappointed).

Appointed to the Texas Mutual Insurance Company Board of Directors for a term to expire July 1, 2015, Linda Stuckey Foster of Georgetown (Ms. Foster is being reappointed).

Appointed to the Committee to Select and Independent Researcher to Study Nursing Educational Programs, pursuant to HB 3961, 81st Legislature, Regular Session, for a term at the pleasure of the Governor, Stacey B. Silverman of Austin.

Appointed to the Housing and Health Services Coordination Council, pursuant to SB 1878, 81st Legislature, Regular Session, for a term to expire September 1, 2013, Jean Langendorf of Cottonwood Shores.

Appointed to the Housing and Health Services Coordination Council, pursuant to SB 1878, 81st Legislature, Regular Session, for a term to expire September 1, 2013, Doni Van Ryswyk of Arlington.

Appointed to the Housing and Health Services Coordination Council, pursuant to SB 1878, 81st Legislature, Regular Session, for a term to expire September 1, 2015, Amy Granberry of Portland.

Appointed to the Housing and Health Services Coordination Council, pursuant to SB 1878, 81st Legislature, Regular Session, for a term to expire September 1, 2015, Paula Margeson of Plano.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Michael Berry of Austin.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Denise Anne Brady of Austin.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, LaShonda Y. Brown of Missouri City.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Mary G. Capello of Laredo.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Deborah H. Cody of Mount Pleasant.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Gina S. Day of Kyle.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Ana De Hoyos O'Connor of San Antonio.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Blanca Estela Enriquez of El Paso.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, John W. Gasko of Houston. Dr. Gasko will serve as presiding officer of the council.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Dorothy "Dottie" Goodman of Austin.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Elsa Cárdenas-Hagan of Olmito.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Angela M. Hobbs-Lopez of Round Rock.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Robert C. Ott, Jr. of Killeen.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Sasha Rasco of Austin.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Elaine F. Shiver of Dallas.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Kimberly A. Wedel of Austin.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, John A. Whitcamp of Fort Worth.

Appointed to the State Advisory Council on Early Childhood Education and Care, pursuant to U.S. Code Title 42, Section 9873b(b)(1)(A), for a term at the pleasure of the Governor, Quincy E. White of Lubbock.

Appointed to the Texas Bioenergy Policy Council, pursuant to SB 1016, 81st Legislature, Regular Session, for a term to expire September 1, 2011, Michael Doguet of Nome.

Appointed to the Teacher Retirement System of Texas Board of Trustees for a term to expire August 31, 2015, Todd F. Barth of Houston (replacing Dory Wiley of Dallas whose term expired).

Appointed to the Teacher Retirement System of Texas Board of Trustees for a term to expire August 31, 2015, Walter Seth Crone, Jr. of Beaumont (replacing John Graham Jr. of Fredericksburg whose term expired).

Appointed to the Teacher Retirement System of Texas Board of Trustees for a term to expire August 31, 2015, Frances Nanette Sissney of Whitesboro (replacing John Henry of Houston whose term expired).

Appointed to the Texas Emerging Technology Advisory Committee for a term to expire August 31, 2010, Michael Bleyzer of Houston (replacing Jose Riojas of El Paso who resigned).

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2011, Arthur R. Emerson of San Antonio (replacing Joe Robles of San Antonio who resigned).

Appointed to the San Jacinto Historical Advisory Board for a term to expire September 1, 2015, Jimmy A. Burke of Deer Park (replacing Al Davis of Houston whose term expired).

Rick Perry, Governor

TRD-200904788

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Proclamation 41-3230

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of Texas, do hereby certify that a long-term statewide drought has caused extreme shortages of both forage and hay throughout the State of Texas. Although Texas has recently received rainfall, the statewide drought experienced over the last two years has severely affected the quantity and quality of forage and hay available to feed livestock. The shortage of forage and hay has created an imminent threat of a loss of livestock for the entire state.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby declare a state of disaster in Texas based on the existence of such threat and direct that all necessary measures both public and private as authorized under Section 418.017 of the code be implemented to meet that threat.

As provided in Section 418.016 of the code, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the state of disaster.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 13th day of October, 2009.

Rick Perry, Governor

Attested by: Esperanza "Hope" Andrade, Secretary of State

TRD-200904787

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Opinion

Opinion No. GA-0742

Mr. Jon Weizenbaum

Commissioner

Texas Department of Aging and Disability Services

Post Office Box 149030

Austin, Texas 78714-9030

Re: Whether the Texas Department of Aging and Disability Services may authorize assisted living facilities to provide nursing services to the terminally ill and other residents (RQ-0794-GA)

SUMMARY

The Legislature authorizes assisted living facilities to provide specific services: food, shelter, personal care services and the administration of medication. In addition, the Legislature allows home and community support services agencies and independent health professionals to provide services within their scope of practice to a resident of an assisted living facility at the facility. However, the Legislature has not authorized the assisted living facilities themselves to provide nursing services beyond personal care services or the administration of medication. To the extent that the Department of Aging and Disability Services' Rule 92.41(e)(1)(B) authorizes the staff of an assisted living facility to provide residents with nursing services beyond those authorized by the statute, it is contrary to the express terms of the assisted living facility statute.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200904784

Stacey Napier

Deputy Attorney General

Office of the Attorney General

Filed: October 20, 2009

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TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39. Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Advisory Opinion Request

AOR-550. The Texas Ethics Commission has been asked to consider whether the contingency fee restrictions in §305.022 of the Government Code as amended by House Bill No. 3445 adopted during the regular session of the 81st Legislature are to be applied retroactively.

The Texas Ethics Commission is authorized by §571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; (9) Chapter 39, Penal Code; (10) Section 2152.064, Government Code; and (11) Section 2155.003, Government Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-200904729
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Filed: October 19, 2009

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Advisory Opinion

EAO-485. The Texas Ethics Commission has been asked to consider whether House Bill No. 2525 adopted during the regular session of the 81st Legislature prohibits a corporation from making expenditures to finance the solicitation of political contributions to a general-purpose committee assisted under §253.100(a) of the Election Code from the employees or families of employees of one or more corporations. (AOR-549)

SUMMARY

As amended by House Bill No. 2525, §253.100(d)(5) of the Election Code does not prohibit a corporation from making expenditures to solicit political contributions from its employees or the families of its employees to a general-purpose committee that it assists under §253.100(a). As provided by §253.100(b) of the Election Code, a corporation may make political expenditures to finance the solicitation of political contributions to a general-purpose committee assisted under §253.100(a) from the stockholders, employees, or families of stockholders or employees of one or more corporations.

The Texas Ethics Commission is authorized by §571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; (9) Chapter 39, Penal Code; (10) Section 2152.064, Government Code; and (11) Section 2155.003, Government Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-200904762
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Filed: October 19, 2009

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 20. REPORTING POLITICAL CONTRIBUTIONS AND EXPENDITURES

SUBCHAPTER B. GENERAL REPORTING RULES

1 TAC §20.61

The Texas Ethics Commission proposes an amendment to §20.61, relating to the purpose of an expenditure made with political funds.

Section 20.61 would clarify the law that requires a person filing a campaign finance report to disclose the "purpose" of an expenditure made with political funds. The proposed rule would require the purpose of an expenditure to include both a description of the category of goods, services, or thing of value received in exchange for the expenditure and a brief statement or description of the candidate, officeholder, or political committee activity that is conducted by making the expenditure. The proposed rule includes a list of acceptable categories and a comment section setting out examples of how certain expenditures would be reported under the rule.

David A. Reisman, Executive Director, has determined that for each year of the first five years that the rule is in effect there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Reisman has also determined that the rule will have no local employment impact.

Mr. Reisman has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be clarity in what is required by the law.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule does not apply to single businesses.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the rule.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the commission concerning the proposed rule may do so at any commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a commission meeting when the commission considers final adoption of the proposed rule. Information concerning the date, time, and location of commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

The amendment to §20.61 is proposed under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

The amendment to §20.61 affects §254.031 of the Election Code.

§20.61. Purpose [~~Description~~] of Expenditure.

(a) For reporting required under §254.031 of the Election Code, the purpose of an expenditure means:

(1) A description of the category of goods, services, or other thing of value for which an expenditure is made. Examples of acceptable categories include:

(A) advertising expense;

(B) accounting/banking;

(C) consulting expense;

(D) contributions/donations made by candidate/officeholder/political committees;

(E) event expense;

(F) fees;

(G) gift expense;

(H) legal services;

(I) loan repayment/reimbursement;

(J) meal expense;

(K) office overhead/rental expense;

(L) polling expense;

(M) printing;

(N) salaries/wages/contract labor;

(O) solicitation/fundraising expense;

(P) transportation equipment and related expense;

(Q) travel in district;

(R) travel out of district;

(S) other political expenditures; and

(2) A brief statement or description of the candidate, officeholder, or political committee activity that is conducted by making the expenditure. The brief statement or description must include the item or service purchased and must be sufficiently specific, when con-

sidered within the context of the description of the category, to make the reason for the expenditure clear. Merely disclosing the category of goods, services, or other thing of value for which the expenditure is made does not adequately describe the purpose of an expenditure.

[~~(a) The report of a political expenditure for goods or services must describe the categories of goods or services received in exchange for the expenditure.~~]

(b) The description of a political expenditure for travel outside of the state of Texas must provide the following:

(1) The name of the person or persons traveling on whose behalf the expenditure was made;

(2) The means of transportation;

(3) The] name of the departure city or the name of each departure location;

(4) The name of the destination city or the name of each destination location;

(5) The dates on which the travel occurred;and

(6) The campaign or officeholder purpose of the travel, including the name of a conference, seminar, or other event.

(c) This rule applies to expenditures made on or after July 1, 2010.

(d) Comments: The purpose of an expenditure must include both a description of the category of goods or services received in exchange for the expenditure and a brief statement or description of the candidate, officeholder, or political committee activity that is conducted by making the expenditure. A description of an expenditure that merely states the item or service purchased is not adequate because doing so does not allow a person reading the report to know the allowable activity for which an expenditure was made.

(1) Example: Candidate X is seeking the office of State Representative, District 2000. She purchases an airline ticket from ABC Airlines to attend a campaign rally within District 2000. The acceptable category for this expenditure is "Travel In District." The candidate activity that is accomplished by making the expenditure is to attend a campaign rally. An acceptable brief statement is "airline ticket to attend campaign event."

(2) Example: Candidate X purchases an airline ticket to attend a campaign rally outside of District 2000 but within Texas, the acceptable category is "Travel Outside District." The candidate activity that is accomplished by making the expenditure is to attend a campaign rally. An acceptable brief statement is "airline ticket to attend campaign event."

(3) Example: Candidate X purchases an airline ticket to attend an officeholder related seminar outside of Texas. The acceptable method for the purpose of this expenditure is by selecting the "Travel Out Of District" category and completing the "Schedule T" (used to report travel outside of Texas).

(4) Example: Candidate X contracts with an individual to do various campaign related tasks such as work on a campaign phone bank, sign distribution, and staffing the office. The acceptable category is "Salary/Wages/Contract Labor." The candidate activity that is accomplished by making the expenditure is to compensate an individual working on the campaign. An acceptable brief statement is "contract labor for campaign services."

(5) Example: Officeholder X is seeking re-election and makes an expenditure to purchase a vehicle to use for campaign purposes and permissible officeholder purposes. The acceptable category is "Transportation Equipment and Related Expenses" and an acceptable brief description is "purchase of campaign/officeholder vehicle."

(6) Example: Candidate X makes an expenditure to repair a flat tire on a campaign vehicle purchased with political funds. The acceptable category is "Transportation Equipment and Related Expenses" and an acceptable brief description is "repair flat tire on campaign vehicle."

(7) Example: Officeholder X purchases flowers for a constituent. The acceptable category is "Gift" and an acceptable brief description is "flowers for constituent."

(8) Example: Political Committee XYZ makes a political contribution to Candidate X. The acceptable category is "Contributions/Donations made by Candidate/Officeholder/Political Committee" and an acceptable brief description is "campaign contribution."

(9) Example: Candidate X makes an expenditure for a filing fee to get his name on the ballot. The acceptable category is "Fee" and an acceptable brief description is "candidate filing fee."

(10) Example: Officeholder X makes an expenditure to attend a seminar related to performing a duty or engaging in an activity in connection with the office. The acceptable category is "Fee" and an acceptable brief description is "attend officeholder seminar."

(11) Example: Candidate X makes an expenditure for political advertising to be broadcast by radio. The acceptable category is "Advertising Expense" and an acceptable brief description is "political advertising on radio."

(12) Example: Candidate X makes an expenditure for political advertising to appear in a newspaper. The acceptable category is "Advertising Expense" and an acceptable brief description is "political advertising in newspaper."

(13) Example: Officeholder X makes expenditures for printing and postage to mail a letter to all of her constituents, thanking them for their participation during the legislative session. Acceptable categories are "Advertising Expense" OR "Printing Expense" and an acceptable brief description is "letter to constituents."

(14) Example: Officeholder X makes an expenditure to pay the campaign office electric bill. The acceptable category is "Office Overhead/Rental Expense" and an acceptable brief description is "campaign office electric bill."

(15) Example: Officeholder X makes an expenditure to purchase paper, postage, and other supplies for the campaign office. The acceptable category is "Office Overhead/Rental Expense" and an acceptable brief description is "campaign office supplies."

(16) Example: Officeholder X makes an expenditure to pay the campaign office monthly rent. The acceptable category is "Office Overhead/Rental Expense" and an acceptable brief description is "campaign office rent."

(17) Example: Candidate X hires a consultant for fundraising services. The acceptable category is "Consulting Expense" and an acceptable brief description is "campaign fundraising services."

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904711

Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 463-5800

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CHAPTER 34. REGULATION OF LOBBYISTS
SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §34.21

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Ethics Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Ethics Commission proposes the repeal of §34.21, relating to contingent fees for influencing purchasing decisions.

The proposed repeal of §34.21 would repeal the rule relating to the contingent fees for influencing purchasing decisions. This rule is no longer necessary in light of House Bill 3445, 81st Legislature.

David A. Reisman, Executive Director, has determined that for each year of the first five years that the rule is in effect there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Reisman has also determined that the rule will have no local employment impact.

Mr. Reisman has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be clarity in what is allowed by the law.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule does not apply to single businesses.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the rule.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the commission concerning the proposed rule may do so at any commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a commission meeting when the commission considers final adoption of the proposed rule. Information concerning the date, time, and location of commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

The repeal of §34.21 is proposed under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

The proposed repeal of §34.21 affects §305.022 of the Government Code.

§34.21. Contingent Fees for Influencing Purchasing Decisions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904712
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 463-5800

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PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 105. SOLICITATIONS

The Office of the Secretary of State proposes to reorganize and revise Chapter 105, concerning solicitations, by proposing the repeal of 1 TAC §§105.1, 105.4, 105.7, 105.31, 105.34, 105.37, 105.101, 105.106, 105.109, 105.131, 105.135, and 105.140 and concurrently proposing new 1 TAC §§105.1, 105.4, 105.7, 105.101, 105.106, and 105.109 and amendments to §§105.201, 105.204 - 105.207, and 105.209. The non-substantive changes are proposed to clarify the rules, update the mailing address for the Office of the Secretary of State, provide an internet site address for access to secretary of state forms for solicitations filings, and replace references to specific forms by name with references to secretary of state form numbers.

The reorganization combines the rules for public safety organizations, public safety publications, independent promoters and their solicitors, rather than repeating the rules in two separate divisions. Similarly, the reorganization combines the rules for veterans organizations and veterans organization solicitors, rather than repeating the rules in two separate divisions.

Additionally, proposed §105.4, regarding updates, correctly states the rule that an update is required after a change of mailing address.

Proposed §105.201 and §105.205, regarding registration and forms for telephone solicitations and the requirement for valid security, respectively, are amended to update outdated statutory references.

FISCAL NOTE

Leigh A. Joseph, Attorney in the Business and Public Filings Division of the Office of the Secretary of State, has determined that for each year of the first five years that the sections are in effect there will be no fiscal implications to state or local governments as a result of enforcing or administering the rules as proposed.

PUBLIC BENEFIT AND SMALL BUSINESS COST NOTE Ms. Joseph has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing or administering the sections as proposed will be to view the rules as corrected. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed rules.

COMMENTS

Comments on the proposed amendments, repeals and new rules may be submitted in writing to: Leigh A. Joseph, Office of the Secretary of State, Corporations Section, P.O. Box 13697,

Austin, Texas 78711-3697. Comments must be received not later than 12:00 noon, November 30, 2009.

SUBCHAPTER A. PUBLIC SAFETY SOLICITATIONS

DIVISION 1. PUBLIC SAFETY ORGANIZATIONS, PUBLIC SAFETY PUBLICATIONS, AND CERTAIN INDEPENDENT PROMOTERS

1 TAC §§105.1, 105.4, 105.7

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the Office of the Secretary of State, Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

Statutory Authority

The repeal of §§105.1, 105.4, and 105.7 is proposed under the authority of §2001.004(1) of the Texas Government Code, which requires state agencies to adopt procedural rules of practice, and §302.102, Texas Business and Commerce Code, which requires the secretary of state to prescribe a form for a telephone solicitation seller's registration statement.

Chapters 1803 and 1804, Texas Occupations Code, and Chapter 302, Texas Business and Commerce Code, are affected by the repeal.

§105.1. Registration.

§105.4. Updates.

§105.7. Filing Fees.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

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Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
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For further information, please call: (512) 463-5562

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DIVISION 2. SOLICITORS FOR PUBLIC SAFETY ORGANIZATIONS, PUBLIC SAFETY PUBLICATIONS, AND CERTAIN INDEPENDENT PROMOTERS

1 TAC §§105.31, 105.34, 105.37

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the Office of the Secretary of State, Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeal of §§105.31, 105.34, and 105.37 is proposed under the authority of §2001.004(1) of the Texas Government Code, which requires state agencies to adopt procedural rules of practice, and §302.102, Texas Business and Commerce Code, which requires the secretary of state to prescribe a form for a telephone solicitation seller's registration statement.

Chapters 1803 and 1804, Texas Occupations Code, and Chapter 302, Texas Business and Commerce Code, are affected by the repeal.

§105.31. Registration.

§105.34. Updates.

§105.37. Filing Fees.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. VETERANS SOLICITATIONS

DIVISION 1. VETERANS ORGANIZATIONS

1 TAC §§105.101, 105.106, 105.109

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the Office of the Secretary of State, Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeal of §§105.101, 105.106, and 105.109 is proposed under the authority of §2001.004(1) of the Texas Government Code, which requires state agencies to adopt procedural rules of practice, and §302.102, Texas Business and Commerce Code, which requires the secretary of state to prescribe a form for a telephone solicitation seller's registration statement.

Chapters 1803 and 1804, Texas Occupations Code, and Chapter 302, Texas Business and Commerce Code, are affected by the repeal.

§105.101. Registration.

§105.106. Reports.

§105.109. Filing Fees.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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DIVISION 2. SOLICITORS FOR VETERANS ORGANIZATIONS

1 TAC §§105.131, 105.135, 105.140

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the Office of the Secretary of State, Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeal of §§105.131, 105.135, and 105.140 is proposed under the authority of §2001.004(1) of the Texas Government Code, which requires state agencies to adopt procedural rules of practice, and §302.102, Texas Business and Commerce Code, which requires the secretary of state to prescribe a form for a telephone solicitation seller's registration statement.

Chapters 1803 and 1804, Texas Occupations Code, and Chapter 302, Texas Business and Commerce Code, are affected by the repeal.

§105.131. Registration.

§105.135. Reports.

§105.140. Filing Fees.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER A. PUBLIC SAFETY SOLICITATIONS

1 TAC §§105.1, 105.4, 105.7

STATUTORY AUTHORITY

New §§105.1, 105.4, and 105.7 are proposed under the authority of §2001.004(1) of the Texas Government Code, which requires state agencies to adopt procedural rules of practice, and §302.102, Texas Business and Commerce Code, which requires the secretary of state to prescribe a form for a telephone solicitation seller's registration statement.

Chapters 1803 and 1804, Texas Occupations Code, and Chapter 302, Texas Business and Commerce Code, are affected by the new rules.

§105.1. Registration; Forms.

(a) A registration statement will be accepted for filing only upon submission of a completed registration form and payment of the applicable fee. See Forms 3201, 3203.

(b) Registration and other forms designed for the purposes of complying with Chapter 1803, Texas Occupations Code and this subchapter are available on the secretary of state web site at www.sos.state.tx.us/statdoc/statforms.shtml or may be obtained by writing the Statutory Documents Section, Office of the Secretary of State, P.O. Box 13550, Austin, Texas 78711-3550. See Forms 3201, 3203, 3205-06.

(c) If an initial or renewal registration is not complete before the 45th day after it is received incomplete, the file will be closed and registration fee forfeited.

(d) If a renewal filing is not received before the 30th day after the registration has lapsed, the file will be closed.

§105.4. Updates.

A registered public safety organization, independent promoter, public safety publication, or solicitor shall file an updated statement and pay the applicable fee within 30 days after the date of a change of street address, mailing address, phone number, or name.

§105.7. Filing Fees.

(a) The filing fee for a new or renewal registration statement for a public safety organization, independent promoter, or public safety publication is $250.

(b) The filing fee for a new or renewal solicitor's registration statement is $500.

(c) The filing fee for an updated statement pursuant to §105.4 of this title (relating to Updates) is $50.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. VETERANS SOLICITATIONS

1 TAC §§105.101, 105.106, 105.109

STATUTORY AUTHORITY

New §§105.101, 105.106, and 105.109 are proposed under the authority of §2001.004(1) of the Texas Government Code, which requires state agencies to adopt procedural rules of practice, and §302.102, Texas Business and Commerce Code, which requires the secretary of state to prescribe a form for a telephone solicitation seller's registration statement.

Chapters 1803 and 1804, Texas Occupations Code, and Chapter 302, Texas Business and Commerce Code, are affected by the new rules.

§105.101. Registration; Forms.

(a) A registration statement will be accepted for filing only upon submission of a completed registration form and payment of the applicable fee. See Forms 3501, 3504.

(b) Registration and other forms designed for the purposes of complying with Chapter 1804, Texas Occupations Code and this subchapter are available on the secretary of state web site at www.sos.state.tx.us/statdoc/statforms.shtml or may be obtained by writing the Statutory Documents Section, Office of the Secretary of State, P.O. Box 13550, Austin, Texas 78711-3550. See Form 3501-06.

(c) If an initial or renewal registration statement is not complete before the 45th date after it is received incomplete, the file will be closed and the registration fee forfeited.

(d) If a renewal filing is not received before the 30th day after the registration has lapsed, the file will be closed.

§105.106. Reports.

(a) Before January 15 of each year, a registered veterans organization that received more than $500 in solicited funds during the preceding calendar year shall file a report with the secretary of state. See Form 3503.

(b) At the end of each calendar quarter, a solicitor who raises more than $5,000 for a veterans organization during that calendar quarter shall file a report with the secretary of state. See Form 3506.

§105.109. Filing Fees.

(a) The filing fee for a new or renewal registration statement for a veterans organization is $150.

(b) The filing fee for a new or renewal solicitor's registration statement is $500.

(c) The filing fee for a report pursuant to §105.106 of this title (relating to Reports) is $50.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. TELEPHONE SOLICITATIONS

1 TAC §§105.201, 105.204 - 105.207, 105.209

STATUTORY AUTHORITY

The amendments to §§105.201, 105.204 - 105.207, and 105.209 are proposed under the authority of §2001.004(1) of the Texas Government Code, which requires state agencies to adopt procedural rules of practice, and §302.102, Texas Business and Commerce Code, which requires the secretary of state to prescribe a form for a telephone solicitation seller's registration statement.

Chapters 1803 and 1804, Texas Occupations Code, and Chapter 302, Texas Business and Commerce Code, are affected by the amendments.

§105.201. Registration; Forms.

(a) A registration statement will be accepted for filing only upon submission of a completed registration form and payment of the applicable fee. See Form 3401.

(b) Registration and other forms designed for the purposes of complying with Chapter 302, Texas Business and Commerce Code and this subchapter are available on the secretary of state web site at www.sos.state.tx.us/statdoc/statforms.shtml or may be obtained by writing the Statutory Documents Section, Office of the Secretary of State, P.O. Box 13550, Austin, Texas 78711-3550. See Forms 3401, 3403-06. [~~The registration statement shall be on a form promulgated by the secretary of state entitled telephone solicitation registration statement. The form may be obtained by writing the Statutory Documents Section, Office of the Secretary of State, P.O. Box 12887, Austin, Texas 78711-2887.~~]

(c) A telephone solicitation seller shall file an irrevocable consent appointing the secretary of state to act as the seller's agent to receive service of any lawful process in any noncriminal suit, action, or proceeding against the seller that may arise under Chapter 302, Texas Business and Commerce Code. [~~Acts 1993, 73rd Legislature, Chapter 569, effective September 1, 1993. The consent shall be on a form promulgated by the secretary of state entitled appointment of the secretary of state as agent for service.~~] The consent form may be obtained by writing the Statutory Documents Section at the address provided in subsection (b) of this section. See Form 3406.

(d) The effective date of a registration statement is the date on which the secretary of state issues the certificate of registration. A registration statement is effective for one year after its effective date and may be renewed.

(e) A registration statement is renewed by filing a renewal registration statement and paying the applicable fee. See Form 3401.

(f) If an initial or renewal registration statement is not complete before the 45th day after it is received incomplete, the file will be closed and the registration fee forfeited.

(g) If a renewal filing is not received before the 30th day after the registration has lapsed, the file will be closed.

§105.204. Updates.

(a) A registered telephone solicitation seller shall file an update addendum at quarterly intervals, computed from the effective date of registration. The addendum must provide all required registration information for all salespersons who are currently soliciting or have solicited on behalf of the seller at any time during the period between the filing of the registration statement or the last addendum and the current addendum.

(b) The update described in subsection (a) of this section may be filed by providing [~~on a form promulgated by the secretary of state entitled telephone solicitor's quarterly update. An alternative method for filing the update is for the seller to provide~~] a copy of the Employer's Quarterly Report for employee wages prepared for filing [~~it files~~] with the Texas Employment Commission.

(c) In addition to the quarterly updates, if a material change in a registration statement, other than the information delineated in subsection (a) of this section, occurs before the date for renewal, a seller shall submit that information by filing an update addendum.

(d) If an update is not filed before the 60th day after it is required to have been filed, the file will be closed and the registration fee forfeited.

(e) If an update is not completed before the 45th day after it is received incomplete, the file will be closed and the update fee and registration fee forfeited.

§105.205. Valid Security Required.

(a) A registrant must maintain the required security during the time the registrant conducts telephone solicitations as defined by §302.107, Texas Business and Commerce Code [~~the Telephone Solicitation Act, Texas Civil Statutes, Articles 5069-18.01(10) (Vernon Supp. 1995)~~].

(b) The registration status of the registrant will be placed in suspense if the security instrument filed by the registrant lapses at any time during the registration period. If valid security has not been properly filed by the 45th day after the security becomes ineffective, the file will be closed and the registration fee forfeited.

§105.206. Release of Security.

(a) Upon the cessation of telephone solicitation business activities, a registrant may request in writing the release of the registrant's security.

(b) Except as provided by subsection (c) of this section, the secretary of state shall release a registrant's security no later than the 90th day after the release request is received in the Statutory Documents Section [~~statutory documents division~~] of the Office of the Secretary of State.

(c) A registrant's security may not be released where the secretary of state has received by mail actual notice that an action has been filed to recover against the security, unless:

(1) a court order directs the security to be released to the registrant by the secretary of state;

(2) documents are filed with the Office of the Secretary of State indicating that a settlement has been approved by a court directing that the security be released to the registrant; or

(3) the registrant files in the Office of the Secretary of State a court order indicating that the action against the registrant has been dismissed.

§105.207. Bond Payout Procedures.

If the amount claimed exceeds the amount of the bond, the surety shall deposit the amount of the bond with the secretary of state for distribution to claimants entitled to recovery. The [~~If the total claims of actual financial loss exceed the amount of the security, the~~] secretary of state shall pay the claims on a pro rata basis by dividing the amount of the security by the total amount of the claims, in order to determine a percentage to be applied to each claim.

§105.209. Filing Fees.

(a) The filing fee for a registration statement is $200. This fee includes one certificate of registration for one location. If the telephone solicitation seller uses one registration statement to register more than one business location, there is a fee of $15 for each additional certificate of registration.

(b) The filing fee for a renewal registration statement is $200. The fee for additional certificates of renewal is as delineated in subsection (a) of this section.

(c) The filing fee for an update addendum pursuant to §105.204 of this title (relating to Updates) is $50.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lorna Wassdorf
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PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 254. POISON CONTROL CENTERS

1 TAC §254.1

The Commission on State Emergency Communications (CSEC) proposes amendments to §254.1 concerning the operation and funding of regional poison control centers.

BACKGROUND AND PURPOSE

Prior law required CSEC and the Department of State Health Services (DSHS), formerly known as the Texas Department of Health, to jointly adopt rules concerning regional poison control centers (Centers). On September 1, 2009, Health and Safety Code Chapters 771 and 777 were amended to transfer all oversight authority over the Centers to CSEC. CSEC proposes amending §254.1 to reflect the changes in statutes.

FISCAL NOTE

Paul Mallett, CSEC's executive director, has determined that for each year of the first five fiscal years that §254.1 is in effect there will be no fiscal implications to the state or local governments as a result of enforcing or administering the proposed section.

PUBLIC BENEFIT

Mr. Mallett has determined that for each year of the first five years the amended section is in effect, the public benefits will come from streamlining oversight of the Centers. Mr. Mallett has also determined that for each year of the first five years the proposed section is in effect there are no probable economic costs to persons required to comply with the section.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

CSEC has determined that this proposal is not a "major environmental rule" as defined by Government Code §2001.0225.

LOCAL EMPLOYMENT IMPACT STATEMENT

CSEC has determined that this proposal does not directly affect a local economy and therefore has not drafted a local employment impact statement as would otherwise be required under Administrative Procedures Act §2001.022.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

In accordance with Government Code §2006.002(c), Mr. Mallett has determined that there will be no adverse economic effect on small businesses or micro-businesses. Accordingly, CSEC

has not prepared the economic impact statement or regulatory flexibility analysis that would otherwise be required.

TAKINGS IMPACT ASSESSMENT

CSEC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted in writing to Patrick Tyler, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942, by fax to (512) 305-6937, or email to patrick.tyler@csec.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

STATEMENT OF AUTHORITY

The amended section is proposed under Health and Safety Code §777.001(b) and §777.009(b), which require CSEC to adopt rules regarding Poison Control Centers.

No other statutes, articles or codes are affected by the proposed new section.

§254.1. Operations and Funding of Poison Control Centers.

(a) Purpose. Health and Safety Code, Chapter 777, provides the [~~and 25 TAC §5.51, provide the Department of State Health Services (Department) and the~~] Commission on State Emergency Communications (Commission) with the authority to establish a program to award grants to fund a network of regional poison control centers. Funding of the grants comes from revenues generated by the equalization surcharge imposed under Health and Safety Code §771.072 and appropriated to the Commission.

[~~(b) Background. The Commission and the Department shall adopt a statewide telecommunications network plan. The plan may establish phased implementation of the network. The plan shall consider the following:~~]

[~~(1) uniform statewide 800-service availability for community and professional access for poison information and referral;~~]

[~~(2) direct access from Public Safety Answering Points to Poison Control Answering Points for emergency calls; and~~]

[~~(3) other features as appropriate and identified by this section.~~]

(b) [~~(c)~~] The Commission shall designate the service area region for each regional poison control center [~~The Texas Health and Human Services (HHS) regions shall define the service areas for the Poison Control Answering Points~~], except where telecommunications network design would greatly increase the cost of routing the system. The regions are as follows:

(1) The University of Texas Medical Branch at Galveston--Texas Health and Human Services (HHS) [~~HHS~~] Regions 5 and 6;

(2) The Dallas County Hospital District/North Texas Poison Center--HHS Regions 3 and 4;

(3) The University of Texas Health Science Center at San Antonio--HHS Regions 8 and 11;

(4) The University Medical Center of El Paso [~~R.E. Thomason General Hospital~~], El Paso County Hospital District--HHS Regions 9 and 10;

(5) The Texas Tech University Health Sciences Center at Amarillo [~~Hospital District as successor to Northwest Texas Hospital~~]--HHS Regions 1 and 2; and

(6) Scott and White Memorial Hospital, Temple--HHS Region 7.

(c) [~~(d)~~] Eligibility for Grants [~~funding~~].

(1) The entities eligible to request grants [~~funding~~] are the regional poison control centers for the state, designated under the Health and Safety Code, Chapter 777, as follows:

(A) The University of Texas Medical Branch at Galveston;

(B) The Dallas County Hospital District/North Texas Poison Center;

(C) The University of Texas Health Science Center at San Antonio;

(D) The University Medical Center of El Paso [~~R.E. Thomason General Hospital~~], El Paso County Hospital District;

(E) The Texas Tech University Health Sciences Center at Amarillo [~~Hospital District as successor to Northwest Texas Hospital~~]; and

(F) Scott and White Memorial Hospital, Temple.

(2) In accordance with Health and Safety Code, §777.009[~~, and 25 TAC §5.52~~], each poison control center must be certified by the American Association of Poison Control Centers (AAPCC) until a statewide system certification is achieved. The Commission [~~and Department~~] shall work [~~together~~] with the AAPCC to certify the statewide poison control network and/or individual centers as required.

(d) Requests for Grants. The Commission shall provide a standard form for the regional poison control centers to request a grant award.

(e) Grant Criteria. [~~Funding criteria.~~] As required by Health and Safety Code §777.009(b), the criteria for awarding grants to the regional poison control centers include the following [~~25 TAC §5.52 applicants must meet all of the goals and objectives outlined in the annual Request for Proposals, including~~]:

(1) (No change.)

(2) the assurance of providing quality services [~~a four-year strategic plan assuring provision of quality service~~];

(3) the availability of other funding sources;

(4) [~~(3)~~] [~~a demonstration that the Poison Control Answering Point is working toward~~] achieving and/or maintaining certification as a poison control center with the AAPCC; and

(5) [~~(4)~~] [~~the availability of other funding sources; the~~] maintenance of effort; and [~~the development or existence of telecommunications systems.~~]

(6) the development or existence of telecommunications systems.

(f) Grant Awards. Upon review and approval of grant requests, the Commission shall award grants to the regional poison control centers from appropriated equalization surcharge to fund approved plans of regional poison control centers to carry out the duties specified in Health and Safety Code, Chapter 777.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200904642
Patrick Tyler
General Counsel
Commission on State Emergency Communications
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For further information, please call: (512) 305-6930

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TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 25. PREPAID FUNERAL CONTRACTS

SUBCHAPTER A. CONTRACT FORMS

7 TAC §§25.1 - 25.5, 25.7

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes to amend §25.1, concerning Definitions; §25.2, concerning Am I Required to Use the Model Contract and Model Waiver; §25.3, concerning What Requirements Apply to a Non-Model Contract or Waiver; §25.4, concerning What Are the Plain Language Requirements for a Non-Model Contract or Waiver; §25.5, concerning How Do I Obtain Approval of a Non-Model Contract or Waiver; and §25.7, concerning Casket and Outer-Burial Containers.

The amended rules are proposed to update and conform the rules related to prepaid funeral contract forms to new statutory provisions. House Bill (HB) 3762, adopted by the 81st Texas Legislature in 2009, amended Subchapters A through F of Chapter 154 of the Finance Code, and added a new Subchapter C-1.

Pre-proposal consultation with stakeholders.

The department provided a draft of proposed revisions to §§25.1 - 25.5 and 25.7, along with a new sample insurance-funded contract and a new sample trust-funded contract to potentially affected permit holders, consumer representatives, industry associations and attorneys known to practice before the department in this area. The department invited those parties to submit comments in writing and/or orally at a meeting which was held on August 31, 2009. The department received written comments, and twenty-nine people attended the August meeting, in addition to department staff. The department made extensive revisions to the sample contract forms and draft rules in response to the comments. The department submitted the revised contract forms and rules to all the original recipients. Once again the department solicited and received both written comments and oral comments at a second meeting held September 21, 2009. Twelve people attended the September meeting, in addition to department staff. The department made further revisions based on those comments.

After the meetings and revisions, some industry representatives who use insurance-funded prepaid contracts still had three unresolved concerns. First, they wanted to reduce printing costs by having the contract pages sequenced differently. Second, they objected to a new requirement that two disclosures be initialed by the purchaser. Third, they objected to the placement of each disclosure in the pertinent section of the contract rather than putting them all on one page.

In response to these concerns, the department assembled a small focus group of persons who were representative of potential prepaid funeral contract purchasers and asked the group to review two different versions of the sample insurance-funded contract. One version was in the layout and page sequencing preferred by the department. The other was in the layout and page sequencing preferred by the insurance industry representatives. The focus group was not told why there were two different versions. The focus group was asked to evaluate whether the layout, page sequencing or content of each contract was understandable. The focus group was also asked to consider the effect of requiring initials on certain disclosures. After obtaining responses from the focus group, which will be discussed in following paragraphs, the department made further revisions to the sample contracts.

On September 29, 2009, the department sent the revised sample contracts to the interested parties and asked for feedback. The department received several oral and written comments and made further changes to the form contracts and proposed figures in response.

Focus group reaction and other considerations produce final form of proposed rules.

1. Page sequencing.

Because of statutory changes, the Statement of Funeral Goods and Services now has a Part A and Part B and does not fit on one page. The department's draft model contract has Part A on page one of the contract and Part B on page two of the contract. The Definitions and other sections of the contract follow beginning on page three.

To reduce printing costs, some insurance-funded permit holders have asked that the rule allow for placement of Part A of the Statement of Funeral Goods and Services on page one, the Definitions and portions of the General Provisions on page two, Part B of the Statement of Funeral Goods and Services on page 3, and the continuation of the General Provisions and other sections starting on page four.

The focus group found the contract form with Part A and B on pages one and three very confusing and strongly urged the department to use the contract form with Part A and B on pages one and two. The rule and model contract forms are presented with this page sequencing.

2. Requiring certain disclosures to be initialed.

Throughout this process, several industry representatives who sell or use insurance-funded prepaid contracts expressed concern regarding the new requirement that two disclosures be initialed. The proposed sample insurance-funded contract has four disclosures that require initials, and one that requires a signature. The first disclosure that has a new requirement that it be initialed informs the purchaser that the amount paid on the insurance policy may not equal the contract price. A similar disclosure is in the current sample contract, but initialing is not required. The focus group felt just saying the amounts could be different

was not enough. They wanted to see the total of all estimated premium payments that could be required under the contract. (See proposed Figure 7 TAC §25.3(i)(4)(D)). The second disclosure with a new initialing requirement informs the purchaser that the refund due, if the purchaser cancels the insurance policy after the free look period, may be less than the premiums paid. (See proposed Figure 7 TAC §25.3(f)(2)(E)). A similar disclosure is in the current sample contract, but initialing is not required.

The department has received consumer calls and inquiries from purchasers who did not understand why their premiums were greater than their contract price, or why they did not receive a refund of all their premiums when they cancelled their contract. Since March 2002, insurance-funded contracts have required a disclosure about the amount of premiums paid and about cancellation refunds, but the purchasers have not been required to initial these disclosures. In March 2002, the department added a requirement that the purchaser initial the disclosure about items that are not included in their contract. After this initialing requirement was implemented, the department experienced a steep decline in calls from consumers who did not understand what items are not normally included in a prepaid funeral contract. This experience demonstrates the efficacy of purchaser acknowledgement.

At the August meeting, provider representatives from both a large and a small funeral home stated that their customers focus on and better understand particular contract provisions when the customer is required to sign a disclosure. Representatives from the large funeral home stated that after it instituted its own initial-required disclosure regarding the fact that premiums paid might be greater than the contract price and setting out the total amount to be paid, the number of complaints they received about this issue was dramatically reduced. Additionally, the focus group members recommended requiring initialing as a means of focusing the purchaser on the information.

After considering all comments, the experience of the department and the funeral home after they required initialing, and the reaction of the focus group to the two versions of the forms, initialed disclosures have been included in these proposed rules and enhanced with the suggestion additions from the focus group.

3. Requiring disclosures to be placed next to the pertinent section of the contract.

Some industry representatives expressed concern regarding the layout of the proposed insurance-funded contract form. They stated that if disclosures requiring initials were placed in the part of the contract to which they apply, the contracts would need another page of carbonless copy paper at a cost of approximately 40 cents per contract, which is more fully discussed in the fiscal note following. They were also concerned that a salesperson might forget to have a customer initial a disclosure if it were in the middle of the contract, rather than having all disclosures on one page.

HB 3762 includes a requirement regarding excess coverage that has been included in the proposed rule. Some industry representatives suggested that a disclosure about excess coverage be placed on a separate page, which would add another 40 cents to the cost of the contract. One of those representatives suggested that the statute contemplates the excess coverage disclosure's being outside the contract. Therefore, the department asked the focus group to evaluate where in the contract this disclosure is most effective.

The focus group suggested that all initialed disclosures should be placed in the contract section to which they apply. The focus group opined that requiring initialed disclosures by the pertinent contract section makes the seller more likely to explain the particular section in depth and the consumer more likely to focus his or her attention on the disclosure. The focus group stated that it was important to place the excess coverage disclosure in the contract section to which it applies; the focus group felt that if this disclosure were on a separate page, it would lose its meaning. The statute does not contemplate the placement of this disclosure on a separate page. Compare Texas Finance Code §154.2021(b), where this disclosure is set forth, with §154.2021(a), which concerns a disclosure to be made in an insurance policy. The group also felt the excess coverage disclosure did not tell the purchaser what their options were, if any. Upon review, the department agreed and additional language was added to the excess coverage disclosure.

One of the conclusions of the House Committee on Financial Institution's Interim Report 2008 regarding prepaid funeral benefits contracts was that the forms lacked adequate consumer disclosure. Additional disclosures are one solution, but the requirements that a purchaser initial the disclosures and that disclosures be placed with the applicable contract provisions make it more likely that the disclosures are communicated and understood by the purchaser.

After considering all comments, the experience of the department, and the reaction of the focus group, initialed disclosures have been included in these proposed rules in the relevant section to which they apply and are not combined on one page.

Description of proposed amendments.

The proposed amendments to §25.1 change the definition of "funeral provider" to reflect changes made to Finance Code §154.002(6). They also add a definition of "non-guaranteed cash advance items" because HB 3762 adds a new provision, codified as Finance Code §154.1511, which states that purchasers may advance all or part of the funds for items that are not price guaranteed. The definition of "non-guaranteed cash advance items" states that the purchaser may advance funds for the "reasonable estimated cost" of the items. The inclusion of "reasonable" in the definition ensures that sellers will not use the cash advance provision to obtain more funds from purchasers than are reasonably necessary to pay for the non-guaranteed items.

The proposed amendment to §25.2(a)(3) reflects the change to the definition of "provider" in Finance Code §154.002(6). The proposed change to Figure 7 TAC §25.2(c) is to delete a reference to a fifteen day waiting period before a purchaser could waive the purchaser's right to cancel the contract, because the waiting period was removed by amendment of Finance Code §154.156; and to delete the state seal.

The proposed amendments to §25.3 update required contract provisions to conform to changes made by HB 3762. Proposed §25.3(a)(4) adds the requirement of new Finance Code §154.151(c)(3) that a non-seller provider agree in the contract to discharge responsibilities imposed on it by Finance Code §154.161. The proposed amendments to §25.3(b) - (e) and (h) update the rule in accordance with the Legislature's amendment to Finance Code §154.151(e) that requires the commission to establish a standard disclosure in each contract to inform purchasers of the goods and services that will be provided or

excluded and the circumstances under which the contract may be modified after the death of the beneficiary.

Proposed amendments to §25.3(b) are made to differentiate §25.3(b), which regulates the statement of guaranteed funeral goods and services, from new §25.3(c), which regulates the statement of non-guaranteed cash advance items. Proposed amendments to Figure 7 TAC §25.3(b) and new Figure 7 TAC §25.3(c)(1) likewise illustrate how guaranteed and cash advance items, respectively, should be set forth. The proposed amendment to §25.3(b)(2) explains that items may be moved from Figure 7 TAC §25.3(c)(1) to Figure 7 TAC §25.3(b) if the price is guaranteed and appropriate disclosures are made. The proposed deletion of current §25.3(b)(5) is due to the inclusion of this subject matter in new §25.3(c). The proposed amendment to newly numbered §25.3(b)(5) is to conform the terms used to Federal Trade Commission (FTC) regulations. The proposed addition of §25.3(b)(7) is to give the sellers flexibility on where to place this required language.

New §25.3(c) arises from the Legislature's enactment of new Finance Code §154.1551, which states that a purchaser of a prepaid funeral benefits contract may agree to advance funds for certain items and which states that the cash advance items shall be segregated from prepaid funeral benefits. New §25.3(c) states that the second section of the contract must set forth the non-guaranteed cash advance items that will be provided. New Figure 7 TAC §25.3(c)(1) is required to be used, except as stated in §25.3(c)(1)(A) - (F). If the contract does not include cash advance items, proposed new Figure 7 TAC §25.3(c)(2) is used to inform the purchaser that cash advance items are not included and that the provider will charge for the listed items at the time of the funeral.

The proposed amendment to §25.3(d) reflects the change to the definition of "provider" in Finance Code §154.002(6).

The proposed amendments to §25.3(e) reflect the change to the definition of "provider" in Finance Code §154.002(6) and conform the rule to new Finance Code §154.1551 provisions, which allow the inclusion of cash advance items.

The proposed amendments to §25.3(f)(1)(A) and (2)(C) arise from the Legislature's deletion in Finance Code §154.156 of a fifteen day waiting period before a purchaser may irrevocably waive his or her right to cancel the contract. The language in current §25.3(f)(2)(E) is proposed to be moved to §25.3(i)(4)(A), where it is also clarified. The proposed addition of new §25.3(f)(2)(E) and new Figure 7 TAC §25.3(f)(2)(E) add an acknowledgement requirement to the disclosure required by §25.3(f)(2)(F) and is in response to complaints received by the department from purchasers who did not understand why they did not receive all the premiums they had paid when they cancelled their policy. The proposed amendment to §25.3(g)(4) arises from the Legislature's expansion of coverage of the Prepaid Funeral Guaranty Fund to cover insurance-funded contracts in Finance Code §154.351.

The proposed amendment to §25.3(h) clarifies that, under certain circumstances, changes can be made to the contract at time of death in regard to the disposition of remains and/or funeral goods and services. The proposed amendments to 7 TAC Figure §25.3(h) are non-substantive clarifications of modifications that may occur at time of death.

The proposed amendment to §25.3(i)(4)(A) results from the movement to that subsection of current §25.3(f)(2)(E) and clarification that all premiums will be returned if insurance coverage is denied.

The proposed amendment to §25.3(i)(4)(C) deletes language which is addressed by §25.3(i)(4)(D). The proposed amendment to §25.3(i)(4)(D) requires a disclosure, which must be acknowledged in writing by the purchaser, that premiums may be more or less than the contract price, and that an estimate of total premiums to be paid must be given. New Figure 7 TAC §25.3(i)(4)(D) sets out the mandatory language of the disclosure. A somewhat similar disclosure is in current sample contract forms, but initialing is not required. The department receives questions from purchasers who do not understand why the total premiums paid are greater than the contract price. As discussed previously, the commission is of the opinion that requiring a signature will focus the purchaser's attention on this disclosure. Also, the focus group stated that it is very important to them that they be shown the total estimated amount of premiums it would take to fully fund the contract.

The proposed amendment to §25.3(i)(4)(E) and new Figure 7 TAC §25.3(i)(4)(E) arise from the enactment of new Finance Code §154.2021(b), which requires that a purchaser receive a conspicuous disclosure, to which the purchaser consents in writing, if the insurance policies used to fund a prepaid benefits contract exceed the total contract price by more than five percent (5%). Additionally, the proposed disclosure informs purchasers that they can ask for other options because the focus group did not understand that they had any other options when this disclosure did not explicitly inform them that they did.

The proposed amendment to §25.3(j) arises from the Legislature's enactment of new Finance Code §154.131, which requires a brochure be given to each purchaser; §154.132, which requires the department to establish a website that informs consumers about prepaid funeral benefits; and §154.133, which requires any sales literature to include a reference to the department's website. The amendment requires notices to the purchaser that he or she will be given the brochure and of the department's prepaid funeral contract informational website address. The proposed amendment to §25.3(j) reflects the change to the definition of "provider" in Finance Code §154.002(6).

The proposed amendment to §25.3(k)(1) deletes the requirement that the state seal be used on the contract, in accordance with the prohibition by Texas Business and Commerce Code §17.08 of unlicensed use of the state seal for a commercial purpose. The proposed amendment to §25.3(l)(5) clarifies that the contract number is required to be stated on only one page of the contract.

The proposed amendment to §25.4(e)(1) changes the type size from 8 and 1/2 point to 9 point for the statement of goods and services selected and for the consumer inquiries and complaint disclosure for reading ease. The proposed amendment to §25.4(e)(1)(A) arises from the Legislature's enactment of new Finance Code §154.1551, which provides for cash advance items, and the proposed addition of §25.3(c) to establish the form of the cash advance section of the contract. The proposed deletion of §25.4(e)(1)(B) will allow the notices and signatures part of the contract as described in proposed 7 TAC §25.3(j) to be in at least 10 point type because industry representatives requested a larger area for signatures. The proposed amendment to §25.4(f)(2) changes the minimum recommended page size of a proposed non-model contract from 8-1/2 inches by 14 inches to 8-1/2 inches by 11 inches because of the change to contract format resulting from the Legislature's enactment of Finance

Code §154.1511, which allows purchasers to advance funds for items that are not price guaranteed. Before the enactment of Finance Code §154.1511, the entire statement of goods and services could fit on one 14 inch long page. With the addition of the cash advance items section, that is no longer possible. Therefore the commission now recommends a minimum page size of the more standard 11 inches.

The proposed amendments to §25.5(c)(1)(A) clarify that a non-model contract filed with the department for approval will be considered a new filing. The proposed amendments also change the dates recited in the rule to refer to the legislative changes of 2009, and to delete outdated year references. The proposed amendments to §25.5(f)(2) change the dates recited in the rule to conform to the effective date of the legislative changes and make two non-substantive changes.

The proposed amendment to §25.7(b)(2)(A)(ii) replaces "protective, or non-protective" with "gasketed, or nongasketed" regarding the type of sealing features of a casket which must be listed on the casket description in a prepaid funeral contract to conform to Federal Trade Commission regulations. The proposed amendment to §25.7(b)(2)(C)(ii) deletes "protective, or non-protective" as a sealing feature on an outer-burial container for the same reason.

Deputy Commissioner Stephanie Newberg, Texas Department of Banking, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rule.

Ms. Newberg also has determined that, for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing the rules is contract forms that comply with the statute as amended in 2009, consistency in forms used by permit holders, greater understanding by the consumer of the benefits and obligations under the contracts, and contract forms that comply with regulations of the Federal Trade Commission.

For each year of the first five years that the rule will be in effect, there will be minimal economic costs to persons required to comply with the rule as proposed. The general practice of the industry today is to use carbonless copy paper, sometimes called NCR paper, for each page that requires writing. The commission's proposal that disclosures requiring initials be placed in the part of the contract to which they apply will add an additional page of carbonless copy paper to the proposed sample insurance-funded contract. Each additional page of carbonless copy paper increases the cost of a contract by approximately 40 cents. Therefore, the rule as proposed is estimated to increase the cost of each insurance-funded contract by 40 cents. Any additional costs to revise the contract to comply with statutory changes are a direct result of the statutory changes rather than the rule. The cost is minimal and is outweighed by the benefit in understanding to the purchaser. The proposed rules do not result in additional carbonless copy paper pages for trust-funded contracts, and therefore no additional cost to these contracts.

There will be a minimal economic impact on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses. Government Code §2006.002 requires additional fiscal analysis if a rule adversely affects a small or micro-business. To be a small or micro-business under §2006.002, a business must be independently owned and operated.

Fifty-five companies have permits to sell insurance-funded contracts. Only nineteen of those companies actually sell contracts. Based on information available to the department, three of the nineteen may be small businesses. An additional two may be micro-businesses. The department says they "may" be small or micro-businesses because three of these permit holders are affiliated with insurance companies. The Texas Attorney General's Office defines independently owned and operated businesses as self-controlling entities that are *not* subsidiaries of other entities or *otherwise subject to control by other entities* and entities that are not publicly traded. HB 3430 Small Business Impact Final Guidelines (April 2008). (Emphasis added). The department is not aware to what extent the three permit holders that are affiliated with insurance companies are independently owned and operated per this definition. The following analysis is provided if any permit holders are considered small or micro-businesses.

The economic impact on these small and micro businesses is minimal. The small/micro business with the least amount of sales sold 56 contracts in 2008. If it sold the same number for the upcoming years, the total cost increase would be $22.40 per year. The small/micro business with the largest number of sales sold 4,986 contracts in 2008. Its total cost increase would be $1,994.40 per year. In comparison, the permit holder with the largest number of sales sold 14,147 contracts in 2008. The total annual costs for this permit holder would increase by $5,658.80. Additionally, due to the amendment of Finance Code §154.1551, which allows purchasers to advance funds for certain items, prepaid funeral benefits contract sellers are now able to sell additional goods and services in connection with a prepaid funeral contract. This new authority provides opportunity for permit holders to increase profits. Therefore additional costs for contracts which contain cash advance items should be offset by additional profits.

In preparing these rules, the department considered the alternative proposed by certain insurance industry representatives, including the page sequencing alternative that would eliminate the extra page of carbonless copy paper and eliminating the requirement that certain disclosures be initialed. As discussed above, the department concluded that these alternatives did not meet the goal of increasing the purchaser's understanding of the transaction.

To be considered, comments on the proposed amendments must be submitted no later than 5:00 p.m. on November 30, 2009. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

Amendments to §§25.1 - 25.5 and 25.7 are proposed under Finance Code §11.307(a), which requires the Finance Commission to adopt rules applicable to each entity regulated by the department, specifying the manner in which the entity provides consumers with information on how to file complaints with the department; Finance Code §154.051, which authorizes the Finance Commission to adopt reasonable rules relating to the enforcement and administration of Chapter 154; Finance Code §154.151(a), which requires the department to approve a sales contract form for prepaid funeral benefits before the form is used; Finance Code §154.151(d) which requires the department to provide model contracts that are easily read and written in plain language; Finance Code §154.151(e) which states that the Finance Commission by rule shall establish a standard disclosure that must be included in each contract to inform

purchasers of the goods and services that will be provided or excluded under the contract and the circumstances under which the contract may be modified after death of the beneficiary, and §154.156, which states that an irrevocable waiver of the right to cancel the contract must comply with plain language requirements.

Finance Code §§154.001, 154.002, 154.131 - 154.133, 154.151 - 154.1511, 154.155, 154.156, 154.161, 154.2021, 154.265 and 154.351 are affected by the proposed amendments.

§25.1. Definitions.

(a) (No change.)

(b) The following words and terms have the following meanings when used in this subchapter, unless the context in which a word or term is used clearly indicates a different meaning that is consistent with the purpose of Finance Code, Chapter 154:

(1) - (2) (No change.)

(3) "Funeral Provider" or "Provider" has the meaning assigned [~~home" means a funeral provider, as that term is defined~~] by Finance Code, §154.002(6), specifically a person [~~funeral home~~] that agrees in a prepaid funeral benefits contract to provide specified prepaid funeral benefits.

(4) - (7) (No change.)

(8) "Non-guaranteed cash advance items" are items for which a purchaser of a prepaid funeral benefits contract may agree to advance funds for all or any portion of the reasonable estimated cost of the items included in the prepaid funeral benefits contract, the actual cost of which are to be determined by existing prices at the time the items are delivered or provided in connection with at-need performance of the contracted funeral.

(9) [~~(8)~~] "Non-model contract" means a prepaid funeral benefits contract form that differs from the model contract with respect to the requirements and standards of §25.3 of this title and §25.4 of this title (relating to What Are the Plain Language Requirements for a Non-Model Contract or Waiver). A model contract does not become a non-model contract because you add your name, trademark, or other information about you, or information about the provider [~~funeral home~~].

(10) [~~(9)~~] "Non-model waiver" means a form of waiver that has the same purpose as but differs from the model waiver with respect to the requirements and standards of §25.2(c) of this title (relating to Am I Required to Use the Model Contract and Model Waiver) and §25.4 of this title. For example, a model waiver does not become a non-model waiver because you add your name, trademark, or other information about you, or information about the provider [~~funeral home~~].

(11) [~~(10)~~] "Prepaid funeral benefits contract" or "contract" means a contract or agreement for prepaid funeral benefits, whether trust-funded or insurance-funded.

(12) [~~(11)~~] "Purchaser" means the person who contracts to buy prepaid funeral benefits. The purchaser may also be the contract beneficiary. If permitted by the context, the term includes the purchaser's authorized agent.

(13) [~~(12)~~] "Responsible person" means the person charged with the disposition of the contract beneficiary's remains by Health and Safety Code, §711.002(a).

(14) [~~(13)~~] "Seller" has the meaning assigned by Finance Code, §154.002(10), specifically a person selling, accepting money or premiums for, or soliciting contracts for prepaid funeral benefits or contracts or insurance policies to fund prepaid funeral benefits in this state.

(15) [~~(14)~~] "Trust-funded contract" means a prepaid funeral benefits contract funded by trust deposits made on behalf of the purchaser.

(16) [~~(15)~~] "You" (or "I" in a section title) means a seller that is licensed under Finance Code, Chapter 154, and is subject to this chapter.

§25.2. Am I Required to Use the Model Contract and Model Waiver?

(a) Use of model contract and waiver. You may use the appropriate model contract or the model waiver described in this subsection except as provided in paragraph (2) of this subsection, but you are not required to do so if you obtain approval to use a non-model contract or waiver.

(1) - (2) (No change.)

(3) You may use a current model contract or model waiver after the department verifies that your proposed form document is a current model document that has been customized by inserting your name and permit number. Your submitted form document may also contain other information about you or a provider [~~funeral home~~] as long as you do not otherwise alter the model document. The department shall approve or disapprove a customized model document on or before the 10th business day following the day the document is filed with the department.

(b) (No change.)

(c) Non-model waivers. You may use a non-model waiver if it addresses substantially the same matters in substantially the same order as the model waiver, to promote comparability and consumer understanding. Your proposed non-model waiver form may contain additional provisions that are fair to consumers in light of the purpose of Finance Code, Chapter 154. You must submit a non-model waiver to the department for approval in the manner required by §25.5 of this title. The model waiver in English appears as:
Figure: 7 TAC §25.2(c)
[~~Figure: 7 TAC §25.2(c)~~]

(d) - (e) (No change.)

§25.3. What Requirements Apply to a Non-Model Contract or Waiver?

(a) Contract requirements. The department must approve a non-model contract before you can use it. Your proposed non-model contract must:

(1) contain a disclosure informing the purchaser of the funeral goods and services that will be provided [~~or excluded~~] under the contract, as described by subsections [~~subsection~~] (b) and (c) of this section;

(2) define terms used in the contract as described by subsection (d) [~~(c)~~] of this section;

(3) state and explain the purchaser's obligations, your obligations, and the name and obligations of the provider [~~funeral home~~] if you are not performing all funeral services under the contract[~~, and the impact of terms in the insurance policy on the contract if the contract is insurance-funded, as described by subsection (d) of this section~~];

(4) if the provider is not the licensed seller, a statement that the provider agrees to discharge the responsibilities imposed on a funeral provider by Finance Code §154.161;

(5) the impact of terms in the insurance policy on the contract if the contract is insurance-funded, as described by subsection (e) of this section;

(6) [~~(4)~~] disclose and explain the purchaser's cancellation rights under the contract and, if the contract is insurance-funded, the effect of insurance policy cancellation or assignment on the contract, as described by subsection (f) [~~(e)~~] of this section;

(7) [~~(5)~~] state events of default under the contract for all parties and explain the consequences of default, as described by subsection (g) [~~(f)~~] of this section;

(8) [~~(6)~~] state and explain the circumstances under which the responsible person may modify or change the contract at the death of the contract beneficiary, as described by subsection (h) [~~(g)~~] of this section;

(9) [~~(7)~~] disclose and explain all payment terms under the contract and related provisions as described by subsection (j) [~~(h)~~] of this section;

(10) [~~(8)~~] contain a section for required signatures and related notices as described by subsection (j) [~~(i)~~] of this section;

(11) [~~(9)~~] contain a standard disclosure explaining how a purchaser can make inquiries or file complaints with specified regulatory agencies, as described by subsection (k) [~~(j)~~] of this section;

(12) [~~(10)~~] comply with subsections (l) [~~(k)~~] and (m) [~~(l)~~] of this section;

(13) [~~(11)~~] comply with §25.4 of this title (relating to What Are the Plain Language Requirements for a Non-Model Contract or Waiver); and

(14) [~~(12)~~] be approved by the department as provided by §25.5 of this title (relating to How Do I Obtain Approval of a Non-Model Contract or Waiver).

(b) Statement of guaranteed funeral goods and services selected. The first section of a proposed prepaid funeral benefits contract must inform the purchaser of the guaranteed funeral goods and services that you will provide [~~or exclude~~] under the contract, as required by Finance Code, §154.151(e). This section must appear entirely on page one of the contract exactly as set out in the model contract and in the following figure [~~below~~], including substantially the same formatting and spacing, except:
Figure: 7 TAC §25.3(b)
[~~Figure: 7 TAC §25.3(b)~~]

(1) (No change.)

(2) you may move specific goods and services from figure 7 TAC §25.3(c)(1) to figure 7 TAC §25.3(b), if you guarantee the price of the good or service and include any required Federal Trade Commission disclosures regarding cash advance items [~~between the category of goods and services to be provided and the category of goods and services not included in the contract~~];

(3) (No change.)

(4) you may add other, specific funeral goods and services to the list of [~~included~~] funeral goods and services to be provided;

[~~(5) you may delete the category designated "cash advance items" under included funeral goods and services if you do not sell cash advance items as prepaid funeral benefits and you list all cash advance items under funeral goods and services not normally included, provided that individual cash advance items may not be added to another category of included goods and services;~~]

(5) [~~(6)~~] you may delete check boxes and related text for sealing features in casket and outer burial container descriptions, for example, "gasketed", "non-gasketed", "seal", and "non-seal", [~~"protective", and "non-protective",~~] if these features are not included in the funeral home's price list; and

(6) [~~(7)~~] if the goods and services you sell are specifically limited and constitute significantly less than those goods and services normally required for a funeral, you may substitute a simplified disclosure that the contract is for your specific goods and services only and that you do not offer any other funeral goods and services. For example, you may substitute this limited disclosure if you sell only services relating to opening and closing of the grave or unique memorials that utilize a token portion of cremains, or if you only sell limited funeral goods such as outer burial containers or caskets without furnishing funeral services.

(7) The Explanation of Certain Charges language may be moved from figure 7 TAC §25.3(c)(1) to figure 7 TAC §25.3(b).

(c) Statement of non-guaranteed cash advance items selected.

(1) The second section of a proposed prepaid funeral benefits contract must inform the purchaser of the non-guaranteed cash advance items that you will provide under the contract, as required by Finance Code §154.1511(b). The section must appear entirely on either page one or two of the contract exactly as set out in the model contract and in the following figure, including substantially the same formatting and spacing, except;
Figure: 7 TAC §25.3(c)(1)

(A) you may delete the non-guaranteed cash advance items section if you do not sell cash advance items;

(B) you may move the Explanation of Certain Charges language to figure 7 TAC §25.3(b);

(C) you may change the subtotal pages references if figures 7 TAC §25.3(b) and 7 TAC §25.3(c)(1) are to be placed on the same page of the contract;

(D) you may move specific goods and services from figure 7 TAC §25.3(c)(1) to figure 7 TAC §25.3(b) if you guarantee the price of the good or service;

(E) you may change the description of specific goods or services if the alteration does not change the intent of the description in the standard disclosure; and

(F) you may add other specific funeral goods and services to the list of non-guaranteed funeral goods and services to be provided only through a non-model filing.

(2) If you delete the statement of non-guaranteed cash advance items, you must include the following figure on the bottom of page one of the contract, including substantially the same formatting and spacing:
Figure: 7 TAC §25.3(c)(2)

(d) [~~(c)~~] Definitions. Your proposed prepaid funeral benefits contract must list, define, and use the terms "contract beneficiary", "responsible person", "provider [~~funeral home~~]", "purchaser", and "seller", or terms commonly understood by consumers to be equivalent, substantially as defined in a model contract. For example, you may [~~substitute the term "provider" for "funeral home", or~~] use a combined term such as "seller/provider" [~~or "seller/funeral home"~~] if you believe the alternate term is more descriptive of your services. If your proposed contract is insurance-funded, you must also list, define, and use the terms "insurance company", "insurance policy", and "premiums" in the contract, or terms commonly understood by consumers to be equivalent, substantially as defined in the department's insurance-funded model contract. You may list, define and use

additional terms if they are consistent with the requirements of §25.4 of this title.

(e) [~~(d)~~] General provisions. Your proposed prepaid funeral benefits contract must recognize and explain the purchaser's obligations, your obligations, and the obligations of the provider [~~funeral home~~] if you are not performing all funeral services under the contract, and the impact of terms in the insurance policy on the contract if the contract is insurance-funded, with respect to:

(1) your obligation (and that of the provider [~~funeral home~~]) to furnish the guaranteed funeral goods and services selected in the contract for a cost not to exceed the total contract price applicable to the guaranteed charges at the death of the contract beneficiary, if the purchaser has fully complied with the contract and with each insurance policy, if the contract is insurance-funded;

(2) your obligation (and that of the provider) to furnish the non-guaranteed cash advance items selected in the contract, if current costs are paid at the time of death or how any unallocated and remaining non-guaranteed funds will be refunded;

(3) [~~(2)~~] the purchaser's inability to change the selected funeral goods and services during the life of the contract unless the contract is voided and replaced with a new contract;

(4) [~~(3)~~] the extent to and conditions under which the purchaser may change the provider [~~funeral home~~] specified in the contract or, with respect to a trust-funded contract, the contract beneficiary;

(5) [~~(4)~~] whether the purchaser may incur tax liability for earnings under a trust-funded contract or for growth under an insurance policy if the contract is insurance-funded;

(6) [~~(5)~~] the extent to which you offer any warranties or guarantees or assert any specific disclaimers of warranty;

(7) [~~(6)~~] the prohibition on partial cancellation of or loans against the contract;

(8) [~~(7)~~] if the transaction may result in available funds in excess of the contract price at the time the funeral is performed, identification of who is entitled to such excess funds;

(9) [~~(8)~~] each party's general contractual duties under the contract and the extent to which the contract is binding on a person who assumes the rights or obligations of a party to the contract;

(10) [~~(9)~~] the manner in which a party must notify other parties of a change of address; and

(11) [~~(10)~~] if the contract is insurance-funded, the requirement that terms of the insurance policy must be consulted for information concerning the obligations of the insurance company and those of the policy owner.

(f) [~~(e)~~] Cancellation or assignment. Your proposed prepaid funeral benefits contract must recognize and explain:

(1) with respect to a trust-funded contract:

[~~(A) the requirement for, and 15-day delay that applies to, a separate, written waiver of cancellation rights if the purchaser chooses to irrevocably waive the right to cancel the contract;~~]

(A) [~~(B)~~] the manner in and conditions under which the purchaser may cancel the contract, including the procedural requirements applicable to a cancellation, including the purchaser's obligation to request cancellation in writing on department-approved forms and your obligation to pay a refund not later than the 30th day after receipt of the purchaser's written cancellation notice;

(B) [~~(C)~~] the amount of the refund or other payment that you will owe the purchaser if the contract is canceled and the conditions or circumstances that may alter the refund amount; and

(C) [~~(D)~~] the refund or other benefits you will owe the purchaser if the contract is canceled at your request; or

(2) subject to modifications or clarifications required by §25.2(a)(2) of this title (Relating to Am I Required to Use the Model Contract and Model Waiver), with respect to an insurance-funded contract:

(A) the purchaser's right to assign the purchaser's interest in an insurance policy by signing a separate document;

(B) the qualification that canceling the contract does not automatically cancel the insurance policy but canceling the insurance policy does cancel the contract;

[~~(C) the requirement for, and 15-day delay that applies to, a separate, written waiver of cancellation rights if the purchaser chooses to irrevocably waive the right to cancel the contract, unless the contract is funded by an insurance policy for which an irrevocable assignment of ownership rights has been made;~~]

(C) [~~(D)~~] the procedural requirements applicable to a cancellation of the contract, including the purchaser's obligation to request cancellation in writing on department-approved forms and the statutory obligation, if applicable, to pay a refund not later than the 30th day after receipt of the purchaser's written cancellation notice;

[~~(E) the refund the purchaser may expect if insurance coverage is denied, and the conditions or circumstances that may alter the refund amount;~~]

(D) [~~(F)~~] the purchaser's obligation to read the insurance policy to determine the conditions imposed upon cancellation and the potential amount of refund that would be due if the policy is canceled during or after the "free look" period;

(E) notice and acknowledgement by the purchaser that if the insurance policy is cancelled at the purchaser's request, the surrender value may be significantly less than the premiums the purchaser paid. The disclosure must appear in the cancellation section exactly as set out in the model contract and in the following figure, without modification, including substantially the same formatting and spacing: Figure: 7 TAC §25.3(f)(2)(E)

(F) [~~(G)~~] the consequences the purchaser may expect, whether refund of premium, receipt of cash surrender value, or other benefits from you or another person, if the contract is canceled at your request; and

(G) [~~(H)~~] the effect that loans against or withdrawal of proceeds accrued under an insurance policy will have on the contract and on price guaranties in the contract.

(g) [~~(f)~~] Default. Your proposed prepaid funeral benefits contract must explain events and consequences of default under the contract and under each insurance policy if the contract is insurance-funded, including:

(1) the potential effect on the contract if the purchaser fails to make a payment or makes a late payment under the contract or under an insurance policy if the contract is insurance-funded;

(2) the effect on the contract and on payments due if the contract beneficiary dies:

(A) before the purchaser's payment obligations have been fulfilled under a trust-funded contract; or

(B) if the contract is insurance-funded:

(i) during a period when an insurance policy pays reduced benefits, if applicable; or

(ii) before the premium obligations have been fulfilled on an insurance policy, if applicable; and

(3) the conditions under which you may owe a full or partial refund to the purchaser of funds received under a contract, or a full or partial abandonment of your rights to anticipated proceeds of an insurance policy if the contract is insurance-funded and proceeds are not yet received, as a consequence of your inability (or the provider's [~~funeral home's~~] inability, if you are relying on another to perform portions of the contract) to furnish the selected funeral goods and services;

(4) a statement that the Prepaid Funeral Guaranty Fund covers the contract and guarantees contract performance [~~only with respect to a trust-funded contract, whether or not the purchaser may make a claim to the prepaid funeral guaranty fund governed by §25.17 of this title (relating to Guaranty Fund), if you are unable to honor the contract terms~~].

(h) [~~(g)~~] Changes to disposition or funeral goods and services [~~a contract~~] at the death of contract beneficiary. Your proposed prepaid funeral benefits contract must disclose the circumstances under which the contract may be modified by the responsible person at the death of the contract beneficiary, as required by Finance Code, §154.151(e). The disclosure must appear exactly as set out in the model contract and in the following figure [~~below~~], without modification, except that the phrase "fully funded" may [~~must~~] be substituted for the phrase "fully paid" wherever it appears in this disclosure when used in an insurance-funded contract. In addition, you may use a larger type size if feasible.
Figure: 7 TAC §25.3(h)
[~~Figure: 7 TAC §25.3(g)~~]

(i) [~~(h)~~] Payment terms. Your proposed prepaid funeral benefits contract must clearly state and explain payment terms and related provisions, including:

(1) how and when you will deposit a payment received under a trust-funded contract, or forward any premiums received to the insurance company for application to an insurance policy if the contract is insurance-funded;

(2) with respect to a trust-funded contract, whether and the extent to which you will retain a portion of the purchaser's payments for reimbursement of your operating and selling expenses;

(3) with respect to a trust-funded contract, the finance charges you will impose, if applicable, provided that the description must also comply with Finance Code, Chapter 345, and other state and federal law governing such charges;

(4) subject to modifications or clarifications required by §25.2(a)(2) of this title, with respect to an insurance-funded contract:

(A) the effect on the contract if insurance coverage is denied and that all premiums will be returned [~~the manner in which written notice of the reason for denial will be sent~~] to the policy owner;

(B) if payment terms under the insurance policy are not disclosed in the contract, a space for the purchaser to initial or sign to acknowledge that the purchaser has received written information regarding the terms governing premium payments in another document that the purchaser received at the time of sale, such as the application for insurance or the insurance policy;

(C) if the information the purchaser receives regarding payment terms under an insurance policy is based on an estimate of premiums, that must be noted [~~notice that actual premiums could be more or less than estimated after the insurance company completes its underwriting process~~];

(D) notice and acknowledgement by the purchaser that insurance premiums paid on the insurance policy or policies may be more or less than the total contract price, and an estimate for total premiums to be paid. The disclosure must appear in the payment terms section exactly as set out in the model contract and in the following figure, without modification, including substantially the same formatting and spacing: [~~; and~~]
Figure: 7 TAC §25.3(i)(4)(D)

(E) notice and acknowledgement by the purchaser if you initially issue insurance policy(s) with an aggregate initial face value in excess of 5% of the total contract price. The disclosure must include the total amount of the policy(s) in excess of 100% of the contract price. The disclosure must appear in the payment terms section exactly as set out in the following figure, without modification, including substantially the same formatting and spacing; and,
Figure: 7 TAC §25.3(i)(4)(E)

(5) other contract provisions that materially relate to payment terms under a contract or under an insurance policy.

(j) [~~(i)~~] Required signatures and notices. Your proposed prepaid funeral benefits contract must contain a section for required signatures and related notices that appears in its entirety on the last page of the contract. This section must include:

(1) a list of all items that must be received or offered before the contract can be signed;

(2) if required by state or federal law, cooling-off period language that includes spaces to note when and where the contract was signed;

(3) notice that the purchaser will receive a copy of the contract;

(4) notice that the purchaser is required to be provided an informational brochure for contracts sold after June 1, 2010;

(5) the Department's prepaid funeral contract informational website address;

(6) [~~(4)~~] if the contract is insurance-funded:

(A) notice that the policy owner will receive a copy of the insurance policy from the insurance company; or

(B) if the insurance company is not legally required to deliver a copy of the insurance policy to the policy owner, notice that the policy owner may request a copy of the insurance policy from the insurance company;

(7) [~~(5)~~] spaces for:

(A) the purchaser's printed name, mailing address, telephone number, social security number (if required), and signature line;

(B) if you are not directly providing the funeral goods and services, the printed name, mailing address, and telephone number of the provider [~~funeral home~~], and spaces for the printed name and signature of the authorized officer or agent signing on behalf of the provider [~~funeral home~~];

(C) your printed name, mailing address, and telephone number, and spaces for the printed name and signature of the authorized officer or agent signing on your behalf; and

(D) the printed name, mailing address, and date of birth of the sole individual designated as contract beneficiary; and

(8) [~~(6)~~] other provisions, party identifications, or certifications legally required for valid execution of the contract.

(k) [~~(j)~~] Inquiries and complaints notice. Your proposed prepaid funeral benefits contract must disclose how a purchaser, potential purchaser or consumer can make consumer inquiries and complaints to the department as required by Finance Code, §11.307(a), and §25.41 of this title (relating to How Do I Provide Information to Consumers on How to File a Consumer Complaint), and to other specified state regulatory agencies with appropriate jurisdiction.

(1) This disclosure must appear exactly as set out in the relevant model contract, including [~~the state seal and~~] the names and contact information for each regulatory agency, without modification, and will vary in context depending on whether the proposed contract is trust-funded or insurance-funded. The model disclosures for both trust-funded and insurance-funded contracts appear in:
Figure: 7 TAC §25.3(k)(1)
[~~Figure: 7 TAC §25.3(j)(1)~~]

(2) If the disclosure does not appear at the bottom of the last page of the contract following the signatures of the parties, it must be placed at the top or bottom of a preceding page and be separated from other contract text by at least 1/2 inches of white space. The disclosure may not be placed on a page by itself.

(l) [~~(k)~~] Additional requirements. A proposed prepaid funeral benefits contract must also contain:

(1) page numbers;

(2) a document title that discloses the contract is for the purpose of prearranging a funeral, such as "Prepaid Funeral Benefits Contract";

(3) a distinguishing form number or name;

(4) your permit number; and

(5) a space for the contract number on at least one of the contract pages.

(m) [~~(l)~~] Your proposed non-model contract or waiver form may contain:

(1) additional contract clauses that are fair to consumers in light of the purpose of Finance Code, Chapter 154; and

(2) additional consumer disclosures that you determine:

(A) will assist the purchaser in understanding the transaction; or

(B) are required by other state or federal law for the type of transaction the contract represents.

§25.4. What Are the Plain Language Requirements for a Non-Model Contract or Waiver?

(a) - (d) (No change.)

(e) Type size and line spacing. You must select a type size for your proposed non-model document that is clearly legible. Minimum type size and line spacing are specified in this subsection. If other state or federal law requires a different type size for a specific disclosure or contractual provision, you should set the specific disclosure or contractual provision in the type size specified by other law.

(1) Typeface size is referred to in points (pt). Because different typefaces in the same point size are not of equal size, type size is not strictly defined in this subsection but is expressed as a minimum size in the Times typeface for visual comparative purposes. Use of a larger size typeface is encouraged. Generally, the type size must be at least as large as 10pt in the Times typeface, except the type size must be at least as large as 9 pt [~~8-1/2pt~~] in the Times typeface for:

(A) the statement of funeral goods and services selected, as described in §25.3(b) and (c) of this title (relating to What Requirements Apply to a Non-Model Contract); and

[~~(B) the required signatures and notices, as described in §25.3(i) of this title; and~~]

(B) [~~(C)~~] the consumer inquiries and complaints disclosure, described in §25.3(k) [~~§25.3(j)~~] of this title.

(2) - (3) (No change.)

(f) Formatting and design. The department will consider the extent to which your non-model document uses the plain language formatting and design concepts described in this subsection.

(1) (No change.)

(2) The minimum recommended page size of a proposed non-model contract is 8-1/2 inches by 11 or 14 inches and 8-1/2 inches by 11 inches for a proposed non-model waiver. However, the page size should ordinarily not be larger than 8-1/2 inches by 17 inches.

(3) - (4) (No change.)

(g) (No change.)

§25.5. How Do I Obtain Approval of a Non-Model Contract or Waiver?

(a) - (b) (No change.)

(c) Review process. This subsection describes when you may reasonably expect the department to approve or deny approval of your proposed non-model document and the procedure the department will follow in making its initial decision.

(1) The time the department's decision is due regarding your proposed non-model document will vary depending upon the date your application is accepted for filing under subsection (b)(2) of this section and on the nature of the document you seek to have approved.

(A) If your proposed non-model contract filing is the result of legislative amendments to Finance Code Chapter 154 effective on or after September 1, 2009, your non-model contract filing will be considered a new contract filing and [~~document is a new non-model contract under Finance Code, §154.151, as effective September 1, 2001,~~] the department will approve or deny approval on or before[~~:~~]

[~~*(i)* the 90th day after the date your application is accepted for filing if the date of filing is before March 1, 2003; or~~]

[~~(ii)~~] the 45th day after the date your application is accepted for filing [~~if the date of filing is on or after March 1, 2003~~].

(B) (No change.)

(2) - (4) (No change.)

(d) - (e) (No change.)

(f) Withdrawn approval. This subsection describes circumstances under which you may not use a previously approved document.

(1) (No change.)

(2) You may not use a prepaid funeral benefits contract form that was approved by the department before the effective date of this rule [~~January 31, 2002~~] (an obsolete contract), except that you may continue using an obsolete contract if the model supplement [~~addendum~~] developed by the department is included as part of the contracting transaction until the later of:

(A) January [~~June~~] 1, 2010 [~~2002~~];

(B) June [~~October~~] 1, 2010 [~~2002~~], if you filed a proposed non-model contract with the department for approval before January [~~June~~] 1, 2010 [~~2002~~]; or

(C) a later date if, before January [~~October~~] 1, 2010 [~~2002~~], you request an extension of time to permit completion of a pending approval proceeding under this section and the commissioner approves your request in writing.

(3) (No change.)

§25.7. Casket and Outer-Burial Containers.

(a) (No change.)

(b) Descriptions.

(1) (No change.)

(2) Description content.

(A) Caskets. The description of a casket under this section must, at a minimum, include the following specifications:

(i) (No change.)

(ii) The type of sealing feature, e.g., sealer, non-sealer, gasketed, or nongasketed [~~protective, or non-protective~~], if specified on the permit holder's price list; and

(iii) (No change.)

(B) (No change.)

(C) Outer-burial container. The description of an outer-burial container under this section must, at a minimum, include the following specifications:

(i) (No change.)

(ii) The type of sealing feature, e.g., sealer, non-sealer, [~~protective, or non-protective,~~] if specified on the permit holder's price list.

(D) - (E) (No change.)

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 16, 2009.

TRD-200904658
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: December 18, 2009
For further information, please call: (512) 475-1300

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PART 4. TEXAS DEPARTMENT OF SAVINGS AND MORTGAGE LENDING

CHAPTER 81. MORTGAGE BANKER REGISTRATION AND RESIDENTIAL MORTGAGE LOAN OFFICER LICENSING

The Finance Commission of Texas (Finance Commission) proposes amendments to 7 TAC Chapter 81, §81.1 and §81.2; and new §§81.3 - 81.19, concerning Mortgage Banker Registration and Residential Mortgage Loan Officer Licensing. The amendments and new sections are proposed in order to implement the provisions of House Bill (HB) 10, HB 963 and HB 2779 as passed by the 81st Texas Legislature, as well as a previous legislative session change to Chapter 55, Texas Occupations Code and to assist the Texas Department of Savings and Mortgage Lending in preparing to participate in the National Mortgage License System Registry. These bills make substantial modifications to the Mortgage Banker Registration Act, Finance Code Chapter 157 relating to the registration and regulation of mortgage bankers and residential mortgage loan originators. These amendments and additional sections substantially mirror rules currently in place in 7 TAC Chapter 80, concerning Mortgage Broker and Loan Officer Licensing.

The proposed amendment to §81.1, concerning Definitions, expands the definition section in order to define terms used in the additional proposed sections.

The proposed amendment to §81.2, concerning Loan Status Forms, adds the term residential mortgage loan originator which is used in the federally mandated Secure and Fair Enforcement Licensing Act of 2008 ("SAFE").

The proposed new §81.3, concerning Licensing - General, provides for the placing of a license in inactive status and the fee for renewing a license.

The proposed new §81.4, concerning Qualifications for Obtaining Licenses, authorizes the Commissioner to require additional information in order to determine that the requirements of the Act have been met.

The proposed new §81.5, concerning Renewals, adds language pursuant to Chapter 55, Texas Occupations Code, which exempts licensees on active military duty from late filing penalties and allows additional time to complete continuing education requirements.

The proposed new §81.6, concerning Criminal History, implements HB 963 which amended Chapter 55, Texas Occupations Code, by providing a means for a potential applicant to request a determination of eligibility relating to the effect a criminal history may have on the approval of the applicant.

The proposed new §81.7, concerning Required Disclosures, requires a residential mortgage loan originator to post the Complaint notice required in §157.007 of the Finance Code.

The proposed new §81.8, concerning Prohibition on False, Misleading, or Deceptive Practices and Improper Dealings, describes what constitutes those acts and is substantially similar to 7 TAC §80.10.

The proposed new §81.9, concerning Advertising, describes the requirements for a residential mortgage loan originator to follow with regard to advertising and is substantially similar to 7 TAC §80.11.

The proposed new §81.10, concerning Books and Records, provides for what books and records are to be maintained and is substantially similar to 7 TAC §80.13.

The proposed new §81.11, concerning Complaints and Investigations, authorizes the Commissioner or the Commissioner's designee to investigate complaints and follows the complaint and investigation procedure found in 7 TAC §80.15.

The proposed new §81.12, concerning Examinations, describes the examination process and is substantially similar to 7 TAC §80.20.

The proposed new §81.13, concerning Investigations, authorizes the Commissioner to conduct an investigation of someone licensed under the Act and is substantially similar to 7 TAC §80.21.

The proposed new §81.14, concerning Hearings and Appeals, provides for hearings under this chapter to be conducted in accordance with 7 TAC Chapter 9 and designates the Hearings Officer for the Finance Commission as the hearings officer under Chapter 81. This section is substantially similar to 7 TAC §80.16.

The proposed new §81.15, concerning Annual Call Reports, provides for annual reporting to the Commissioner and is similar to 7 TAC §80.23.

The proposed new §81.16, concerning Recovery Fund, clarifies allocation of license and renewal fees to the Recovery Fund in compliance with Finance Code, Chapter 180 and administration of the Recovery Fund in accordance with Finance Code, Chapter 156.

The proposed new §81.17, concerning Interpretations, authorizes the Commissioner to publish written interpretations of the Act and the regulations.

The proposed new §81.18, concerning Enforceability of Liens, clarifies that a violation of this chapter does not render an otherwise enforceable lien invalid.

The proposed new §81.19, concerning Savings Clause, provides for a portion or provision of this chapter to be held invalid without affecting the remainder of the chapter.

Douglas B. Foster, Commissioner of the Department of Savings and Mortgage Lending, has determined that for the first five-year period that the amended and new sections, as proposed, will be in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering these sections, and they will add equal amounts of revenue and costs to the department.

Commissioner Foster estimates that for the first five years that the proposed amended and new sections are in effect, the public will benefit by adding the provision for administrative claims in addition to the current court judgments as a means for a consumer to reach the Recovery Fund. The economic effect on individuals, small or micro businesses will be negligible.

Comments on the proposed amendments and new sections may be submitted in writing to Douglas B. Foster, Commissioner, Texas Department of Savings and Mortgage Lending, 2601 North Lamar, Suite 201, Austin, Texas 78705 or e-mailed to smlinfo@sml.state.tx.us, no later than 30 days from the date this proposal is published in the *Texas Register.*

SUBCHAPTER A. LICENSING

7 TAC §§81.1 - 81.6

The amendments and new sections are proposed under Finance Code, §157.011, which authorizes the Finance Commission to adopt rules as provided by Chapter 157 of the Act.

The section of the Act affected by the proposed amendments and new sections is Finance Code, §157.011, relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The proposed amendments and new sections relate to the following sections of the Finance Code: §§157.001, 157.002, 157.007, 157.008, 157.012, 157.015, 157.016, 157.020, and 157.021.

§81.1. Definitions.

(a) "Mortgage banker" shall have the same meaning as that provided in Finance Code [~~Chapter~~] §157.002(4)[~~(2)~~].

(b) "Residential mortgage [~~Mortgage~~] loan" shall have the same meaning as that provided in Finance Code [~~Chapter~~] §157.002(5) [~~(3)~~].

(c) "Commissioner's designee" means an employee of the department performing his or her assigned duties or such other person as the Commissioner may designate in writing. A Commissioner's designee is deemed to be the Commissioner's authorized "personnel or representative" as such term is used in the Act.

(d) "Department" means the Department of Savings and Mortgage Lending.

(e) "Physical Office" means an actual office where the business of mortgage lending and/or the business of taking or soliciting residential mortgage loan applications is conducted. It must have a street address. A post office box or other similar designation will not suffice. It must be accessible to the general public as a place of business and must hold itself open on a regular basis during posted hours. The posted hours of business must be posted in a manner to give effective notice to walk-up traffic as to the hours of opening and closing. Normally this will require posting of the hours on an exterior door or window of the office. In those instances where the physical office is in a shared office suite or building, the hours may be posted in a common lobby or reception area. During the hours in which the physical office is open, at least one staff member must be present to assist customers. The physical office of a residential mortgage loan originator need not be the location at which such person's required records are maintained, but the location at which such required records are maintained must be accessible to the Commissioner or the Commissioner's designee for examination during normal business hours.

(f) "Employee" means, with respect to an individual working for a mortgage banker, any individual whom the mortgage banker has elected to treat as an employee for federal income tax and FICA withholding purposes.

(g) "Recovery Fund" means the Mortgage Broker Recovery Fund established and administered in accordance with Chapter 156, Subchapter F of the Finance Code.

(h) "Criminal Offense" means any violation of any state or federal criminal statute which:

(1) involves theft, misappropriation, or misapplication, of monies or goods in any amount;

(2) involves the falsification of records, perjury, or other similar criminal offenses indicating dishonesty;

(3) involves the solicitation of, the giving of, or the taking of bribes, kickbacks, or other illegal compensation;

(4) involves deceiving the public by means of swindling, false advertising or the like;

(5) involves acts of moral turpitude and violation of duties owed to the public including, but not limited to, the unlawful manufacture, distribution, or trafficking in a controlled substance, dangerous drug, or marijuana;

(6) involves acts of violence or use of a deadly weapon;

(7) when considered in connection with several other violations committed by the same person over a period of time forms part of a pattern showing a lack of respect for, disregard for, or, apparent inability to follow, the criminal law; or

(8) involves any other crime which the Commissioner determines has a reasonable relationship to whether a person is fit to serve as a residential mortgage loan originator in a manner consistent with the purposes of the Act and the best interest of the State of Texas and its residents.

§81.2. Loan Status Forms.

(a) Unless exempted under subsection (c) of this section, whenever a mortgage banker or residential mortgage loan originator provides a prospective residential mortgage loan applicant with written confirmation of the prospective loan applicant's conditional qualification for a loan that has not been approved, the mortgage banker or residential mortgage loan originator shall use the form attached as Form A in paragraph (5) of this subsection [~~below~~]. Such form may be modified as follows:

(1) The descriptive heading "Conditional Qualification Letter" may not be omitted;

(2) Additional aspects of the Loan may be described as long as they are not misleading;

(3) Additional items that the mortgage banker or residential mortgage loan originator has reviewed may be described;

(4) Additional terms, conditions, and requirements may be added; and

(5) An alternative form may be used if it provides at least the same information as is set forth in the approved form.
Figure: 7 TAC §81.2(a)(5) (No change.)

(b) Whenever a mortgage banker or residential mortgage loan originator [~~loan officer~~] provides a residential mortgage loan applicant with confirmation that an application for a mortgage loan has been approved as to credit but not as to collateral, the mortgage banker or residential mortgage loan originator shall [~~may~~] use the form attached as Form B in paragraph (6) of this subsection [~~below~~]. Such form may be [~~maybe~~] modified as follows:

(1) The descriptive heading "Conditional Approval Letter" may not be omitted;

(2) Additional aspects of the Loan may be described as long as they are not misleading;

(3) Fees charged may be disclosed but such disclosure shall not serve as a substitute for the Good Faith Estimate required by the Real Estate Settlement Procedures Act.

(4) Additional items that the mortgage banker or residential mortgage loan originator has reviewed may be described;

(5) Additional terms, conditions, and requirements may be added;

(6) An alternative form may be used if it provides at least the same information as is set forth in the approved form.
Figure: 7 TAC §81.2(b)(6) (No change.)

(c) A mortgage banker or residential mortgage loan originator who makes a "firm offer of credit" as defined in the Fair Credit Reporting Act (the "FCRA", 15 U.S.C. [~~USC~~] §1681 et seq), is exempted from the requirement to use the Conditional Qualification Letter as required by subsection (a) of this section provided that the firm offer of credit is made in conformity with the requirements of the FCRA.

§81.3. Licensing - General.

(a) Inactive Licenses. A residential mortgage loan originator may place his/her license inactive at any time during the license period. The license will remain inactive until the residential mortgage loan originator notifies the department in writing to convert the license to an active license or until the license expires. While in an inactive status, a residential mortgage loan originator must continue to meet the statutory requirements of the license including, but not limited to notifying the department of the location of his/her books and records as required by §81.10 of this chapter (relating to Books and Records).

(b) The fees for the application or for the renewal of a residential mortgage loan originator license shall be established by the Commissioner. The amount of the fees may be modified upon not less than 30 days advance notice posted on the Department's website. Fees are nonrefundable and nontransferable.

§81.4. Qualifications for Obtaining Licenses.

Additional Information. The Commissioner may require such additional, clarifying, or supplemental information from any applicant for the issuance or renewal of any license pursuant to the Act as is deemed necessary or advisable to determine that the requirements of the Act have been met.

§81.5. Renewals.

A licensed individual on active military duty serving outside of Texas shall be exempt from any reinstatement fee imposed for renewing after the expiration date of the license, and is entitled to an additional amount of time, equal to the total number of years or parts of years that the individual serves on active duty, to complete any continuing education requirements and other requirements related to the renewal of the license, pursuant to §55.001, Occupations Code.

§81.6. Criminal History.

An individual considering applying for a residential mortgage loan originator license may request a criminal history evaluation letter regarding the person's eligibility for a license, as defined in Chapter 53, Subchapter D of the Occupations Code. The request must be made on a form promulgated by the department and include all pertinent court documentation including certified copies of all court indictments and/or judgments and orders, and an explanation of the circumstances and events of the criminal action that led to the indictment, conviction or sentence, and the basis for the person's potential ineligibility. The fee for this process is $75 per request. Upon receipt of the request, the department will:

(1) Investigate the information provided by the individual to determine if there is ground for ineligibility; and

(2) Notify the individual as to the department's determination within 90 days of receipt of the individual's request.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904713
Caroline Jones
General Counsel
Texas Department of Savings and Mortgage Lending
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 475-1352

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SUBCHAPTER B. PROFESSIONAL CONDUCT

7 TAC §§81.7 - 81.9

The new sections are proposed under Finance Code, §157.011, which authorizes the Finance Commission to adopt rules as provided by Chapter 157 of the Act.

The section of the Act affected by the proposed sections is Finance Code, §157.011, relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The propose sections relate to the following sections of the Finance Code: §§157.001, 157.002, 157.007, 157.008, 157.012, 157.015, 157.016, 157.020, and 157.021.

§81.7. Required Disclosures.

(a) The disclosure statement required in §157.007, Finance Code, shall also be conspicuously posted in each registered office where a residential mortgage loan originator conducts business on a face-to-face basis. A notice is deemed to be conspicuously posted if a customer with 20/20 vision can read it from the place where he or she would typically conduct business or if it is included on a bulletin board, in plain view, on which all required notices to the general public (such as equal housing posters) are posted.

(b) If a mortgage banker or residential mortgage loan originator maintains a website, the disclosure statement in §157.007, Finance Code, must be included in a screen prominently displayed on the website.

§81.8. Prohibition on False, Misleading, or Deceptive Practices and Improper Dealings.

(a) No residential mortgage loan originator may:

(1) knowingly misrepresent his or her relationship to a residential mortgage applicant or any other party to an actual or proposed residential mortgage loan transaction;

(2) knowingly misrepresent or understate any cost, fee, interest rate, or other expense in connection with a residential mortgage applicant's applying for or obtaining a residential mortgage loan;

(3) disparage any source or potential source of residential mortgage loan funds in a manner which knowingly disregards the truth or makes any knowing and material misstatement or omission;

(4) knowingly participate in or permit the submission of false or misleading information of a material nature to any person in connection with a decision by that person whether or not to make or acquire a residential mortgage loan;

(5) as provided for by the Real Estate Settlement Procedures Act and its implementing regulations, broker, arrange, or make a residential mortgage loan in which the residential mortgage loan originator retains fees or receives other compensation for services which are not actually performed or where the fees or other compensation received bear no reasonable relationship to the value of services actually performed;

(6) recommend or encourage default or delinquency or continuation of an existing default or delinquency by a residential mortgage applicant on any existing indebtedness prior to closing a residential mortgage loan which refinances all or a portion of such existing indebtedness;

(7) induce or attempt to induce a party to a contract to breach the contract so the person may make a residential mortgage loan;

(8) alter any document produced or issued by the Department; or

(9) engage in any other practice which the Commissioner, by published interpretation, has determined to be false, misleading, or deceptive.

(b) The term "improper dealings" in §157.024(a)(3) of the Act includes, but is not limited to the following:

(1) Acting negligently in performing an act for which a person is required under the Act to hold a license;

(2) Violating any provision of a federal, State of Texas, or local constitution, statute, rule, ordinance, regulation, or final court decision that governs the same activity, transaction, or subject matter that is governed by the provisions of the Act or this chapter; or

(3) Violating any provision of the following statutes, regulations, and constitutional provisions, or their successor statutes, regulations, and provisions:

(A) Real Estate Settlement Procedures Act, 12 U.S.C. Chapter 2600;

(B) Regulation X, 24 C.F.R. Part 3500;

(C) Consumer Credit Protection Act, 15 U.S.C. Chapter 1600 (Truth in Lending Act);

(D) Regulation Z, 12 C.F.R. Part 226;

(E) Equal Credit Opportunity Act, 15 U.S.C. §1691;

(F) Regulation B, 12 C.F.R. Part 202; and

(G) Section 50, Article XVI, Texas Constitution.

(c) A residential mortgage loan originator or mortgage banker engages in a false, misleading or deceptive practice or improper dealings when in connection with the origination of a mortgage loan:

(1) The person offers other goods or services to a consumer in a separate but related transaction and the person engages in a false misleading or deceptive practice in the related transaction; or

(2) The mortgage banker's residential mortgage loan originator offers other goods or services to a consumer in a separate but related transaction and the person engages in a false, misleading or deceptive practice in the related transaction; and the mortgage banker knew or should have known of the transaction; or

(3) A mortgage banker or residential mortgage loan originator affiliates with a second residential mortgage loan originator who offers other goods or services to a consumer in a separate but related transaction, and the second residential mortgage loan originator engages in a false, misleading or deceptive practice in the related transaction when the mortgage banker or residential mortgage loan originator participates with the second residential mortgage loan originator in the separate transaction or when the mortgage banker allows the second residential mortgage loan originator to originate loans in the name of the mortgage banker and the mortgage banker knew or should have known of the related transaction performed by the second residential mortgage loan originator.

§81.9. Advertising.

(a) Any advertisement of residential mortgage loans which are offered by or through a mortgage banker or residential mortgage loan originator shall conform to the following requirements:

(1) If an advertisement states a rate of finance charge, it shall state the rate as an "annual percentage rate," using that term (as defined in 12 C.F.R. §226.22). If the annual percentage rate may be

increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(2) If any of the following terms is set forth in an advertisement, the advertisement shall meet the requirements of paragraph (3) of this subsection:

(A) The amount or percentage of any down payment.

(B) The number of payments or period of repayment.

(C) The amount of any payment.

(D) The amount of any finance charge.

(E) The amount of any closing costs (for example: "total closing costs only $100.00" or "No Closing Costs").

(3) An advertisement stating any of the terms in paragraph (2) of this subsection shall state the following terms, as applicable (an example of one or more typical extensions of credit with a statement of all the terms applicable to each may be used):

(A) The amount or percentage of the down payment.

(B) The terms of repayment.

(C) The annual percentage rate, using that term, and, if the rate may be increased after consummation of that fact.

(4) An advertisement shall be made only for such products and terms as are actually available and, if their availability is subject to any material requirements or limitations, the advertisement shall specify those requirements or limitations;

(5) An advertisement shall not make any statement or omit to make any statement the result of which is to present a misleading or deceptive impression to consumers;

(6) Except as provided in subsection (c) of this section, the advertisement shall contain:

(A) the name of the residential mortgage loan originator followed by the name of the mortgage banker employer, as designated in the records of the Commissioner as of the date of the advertisement;

(B) the unique identifier of the residential mortgage loan originator; and

(C) the physical street address in Texas of the residential mortgage loan originator or mortgage banker employer; and

(7) An advertisement shall otherwise comply with applicable state and federal disclosure requirements.

(b) A residential mortgage loan originator receiving a verbal or written inquiry about his or her services shall respond accurately to any questions about the scope and nature of such services and any costs.

(c) For purposes of this section, an advertisement means a commercial message in any medium that promotes directly or indirectly, a credit transaction. However, the requirements of subsection (a)(6) of this section shall not apply to:

(1) any advertisement which indirectly promotes a credit transaction and which contains only the name of the mortgage banker or residential mortgage loan originator and does not contain any contact information, such as the inscription of the name on a coffee mug, pencil, youth league jersey or other promotional item; or

(2) any rate sheet, pricing sheet, or similar proprietary information provided to realtors, builders, and other commercial entities that is not intended for distribution to consumers.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Caroline Jones
General Counsel
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SUBCHAPTER C. ADMINISTRATION AND RECORDS

7 TAC §81.10

The new section is proposed under Finance Code, §157.011, which authorizes the Finance Commission to adopt rules as provided by Chapter 157 of the Act.

The section of the Act affected by the proposed section is Finance Code, §157.011, relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The proposed section relates to the following sections of the Finance Code: §§157.001, 157.002, 157.007, 157.008, 157.012, 157.015, 157.016, 157.020, and 157.021.

§81.10. Books and Records.

(a) In order to assure that each licensee will have all records necessary to enable the Commissioner or the Commissioner's designee to investigate complaints and discharge their responsibilities under the Act and this chapter, each residential mortgage loan originator shall maintain records as set forth in subsection (b) of this section. The particular format of records to be maintained is not specified. However, they must be complete, current, legible, readily accessible, and readily sortable. Records maintained for other purposes, such as compliance with other state and federal laws, will be deemed to satisfy these requirements if they include the same information.

(b) Residential Mortgage Application Records. Each residential mortgage loan originator is required to maintain, at the location specified in his or her application, the following books and records:

(1) A residential mortgage loan file for each mortgage loan application received; each such file shall contain at least the following:

(A) a copy of the signed and dated mortgage loan application (including any attachments, supplements, or addenda thereto);

(B) either a copy of the signed closing statement or documentation of the timely denial or other disposition of the application for a mortgage loan;

(C) a copy of the disclosure statement required by §157.007 of the Act;

(D) a copy of each item of correspondence, each evidence of any contractual arrangement or understanding (including, but not limited to, any interest rate lock-ins or loan commitments), and all

notes and memoranda of conversations or meetings with any residential mortgage loan applicant or any other party in connection with that mortgage loan application or its ultimate disposition;

(E) a copy of the notice to applicants required by Finance Code, §343.105.

(2) Mortgage Transaction Log. A residential mortgage transaction log, maintained on a current basis (which means that all entries must be made within no more than seven days from the date on which the matters they relate to occurred), setting forth, at a minimum:

(A) the name of each residential mortgage loan applicant and how to contact them;

(B) the date of the mortgage loan application; and

(C) a description of the disposition of the application for a mortgage loan.

(3) General Business Records. The following general business records:

(A) all checkbooks, check registers, bank statements, deposit slips, withdrawal slips, and cancelled checks (or copies thereof) relating to the residential mortgage business of such person;

(B) complete records (including invoices and supporting documentation) for all expenses and fees paid on behalf of a residential mortgage loan applicant, including a record of the date and amount of all such payments actually made by each applicant;

(C) copies of all federal tax withholding forms, reports of income for federal taxation, and evidence of payments to all employees, independent contractors and others compensated by such residential mortgage loan originator in connection with the conduct of residential mortgage lending business;

(D) copies of all written complaints or inquiries (or summaries of any verbal complaints or inquiries) along with any and all correspondence, notes, responses, and documentation relating thereto and the disposition thereof;

(E) copies of all contractual arrangements or understandings with third parties in any way relating to the providing of residential mortgage lending services (including, but not limited to, any delegations of underwriting authority, any agreements for pricing of goods or services, any investor contracts, any employment agreements, and any non-compete agreements);

(F) copies of all reports of audits, examinations, examinations, reviews, investigations, or other similar matters performed by any third party, including any regulatory or supervisory authorities; and

(G) copies of all advertisements in the format (recorded sound, video, print, etc.) in which they were published or distributed.

(4) Each residential mortgage loan originator shall maintain such other books and records as may be required to evidence compliance with applicable state and federal laws and regulations including, but not limited to, the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, and the Truth in Lending Act.

(5) Each residential mortgage loan originator shall maintain such other books and records as the Commissioner or the Commissioner's designee may from time to time specify in writing.

(6) Each and all of the foregoing books and records must be maintained in good order and shall be produced for the Commissioner or the Commissioner's designee upon request. Failure to produce such books and records upon request, after a reasonable time for compliance, may be grounds for suspension or revocation of a license.

(7) The foregoing books and records shall be maintained for three years or such longer period(s) as may be required by applicable state and/or federal laws and regulations.

(8) A residential mortgage loan originator may meet applicable record-keeping requirements if his or her mortgage banker maintains the required records. Upon termination of a mortgage banker's employment of a residential mortgage loan originator, that originator's records shall remain with the mortgage banker or transferred to the new mortgage banker employer. The Commissioner shall be advised in writing within ten days of any transfer of such records. Upon written request from a former residential mortgage loan originator employee, a former mortgage banker employer may release to his or her former residential mortgage loan originator employee copies of records relating to residential mortgage loans handled by such former employee.

(9) Upon the termination of operations as a mortgage banker or residential mortgage loan originator, the mortgage banker or residential mortgage loan originator shall notify the department where the required records will be maintained for the prescribed periods. If such records are transferred to another mortgage banker, the transferee mortgage banker shall, within ten days of accepting responsibility for maintaining such records, advise the Commissioner in writing of that fact.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Caroline Jones
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SUBCHAPTER D. COMPLAINTS AND INVESTIGATIONS

7 TAC §81.11

The new section is proposed under Finance Code, §157.011, which authorizes the Finance Commission to adopt rules as provided by Chapter 157 of the Act.

The section of the Act affected by the proposed section is Finance Code, §157.011, relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The proposed section relates to the following sections of the Finance Code: §§157.001, 157.002, 157.007, 157.008, 157.012, 157.015, 157.016, 157.020, and 157.021.

§81.11. Complaints and Investigations.

(a) Upon receipt of a signed, written complaint setting forth known, suspected, or asserted facts relating to acts or omissions of a person required to be licensed under the Act, the Commissioner or the Commissioner's designee will:

(1) make an initial determination whether the complaint sets forth reasonable cause to warrant an investigation;

(2) if it has been determined that the complaint warrants an investigation, advise the residential mortgage loan originator who is the subject of the complaint by written notice to the authorized office specified on that person's license that a complaint has been filed;

(3) if it is determined that a complaint does not warrant investigation, so advise the complainant and close the file, advising the complainant of the right to bring forth additional facts or information to have the initiation of an investigation reconsidered;

(4) if an investigation is to be conducted, advise the party who is the subject of the complaint that an investigation will be conducted and conduct such investigation as is deemed appropriate in light of all the relevant facts and circumstances then known. Such investigation may include any or all of the following:

(A) review of documentary evidence;

(B) interviews with complainants, licensees, and third parties;

(C) obtaining reports, advice, and other comments and assistance of other state and/or federal regulatory, enforcement, or oversight bodies; and

(D) such other lawful investigative techniques as the Commissioner reasonably deems necessary and/or appropriate, including, but not limited to, requesting that complainants and/or other parties made the subject of complaints provide explanatory, clarifying, or supplemental information.

(b) The Commissioner may conduct an undercover or covert investigation only if the Commissioner, after due consideration of the circumstances, determines that the investigation is necessary to prevent immediate harm and to carry out the purposes of the Act.

(c) The Commissioner may authorize or direct an employee of the department to initiate a complaint against a person licensed under the Act and to conduct the appropriate investigation if:

(1) a court judgment or an administrative claim against that person has been paid from the Recovery Fund;

(2) the Commissioner has reasonable cause to suspect or believe that person may have been convicted of a criminal offense which may constitute grounds for the suspension or revocation of that person's license; or

(3) that person has failed to honor a check issued to the Commissioner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. EXAMINATIONS AND INVESTIGATIONS

7 TAC §81.12, §81.13

The new sections are proposed under Finance Code, §157.011, which authorizes the Finance Commission to adopt rules as provided by Chapter 157 of the Act.

The section of the Act affected by the proposed sections is Finance Code, §157.011, relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The proposed sections relate to the following sections of the Finance Code: §§157.001, 157.002, 157.007, 157.008, 157.012, 157.015, 157.016, 157.020, and 157.021.

§81.12. Examinations.

(a) The Commissioner, operating through the department staff and such others as the Commissioner may, from time to time, designate will conduct periodic examinations of residential mortgage loan originator licensees as the Commissioner deems necessary.

(b) Except when the department determines that giving advance notice would impair the examination, the Department will give licensees advance notice of each examination. Such notice will be sent to the licensee's address of record or e-mail address on file with the department and will specify the date on which the department's examiners are scheduled to arrive at the licensee's office. Failure of the licensee to actually receive the notice will not be grounds for delay or postponement of the examination. The notice will include a list of the documents and records the licensee should have available for the examiner to review.

(c) Examinations will be conducted to determine compliance with the Act and will specifically address whether:

(1) All persons conducting residential mortgage loan activity are properly licensed;

(2) All locations at which such activities are conducted are properly licensed;

(3) All required books and records are being maintained in accordance with §81.10 of this chapter (relating to Books and Records);

(4) Legal and regulatory requirements applicable to licensees or the licensee's residential mortgage business are being properly followed; and

(5) Such other matters as the Commissioner may deem necessary or advisable to carry out the purposes of the Act.

(d) The examiner will review a sample of residential mortgage loan files identified by the examiner on the date of examination and randomly selected from the licensee's residential mortgage transaction log. The examiner may expand the number of files to be reviewed if, in his or her discretion, conditions warrant.

(e) The examiner may require a licensee, at his or her own cost, to make copies of loan files or such other books and records as the examiner deems appropriate for the preparation of or inclusion in the examination report.

(f) The work papers, compilations, findings, reports, summaries, and other materials, in whatever form, relating to an examination conducted under this section, shall be maintained as confidential except as required or expressly permitted by law.

(g) Failure of a licensee to cooperate with the examination or failure to grant the examiner access to books, records, documents, operations, and facilities of the licensee will subject the licensee and any mortgage banker employer to enforcement actions by the Commissioner, including, but not limited to, administrative penalties.

(h) Whenever the department must travel out-of-state to conduct an examination of a licensee because that licensee maintains required records at a location outside of the state, the licensee will be required to reimburse the department for the actual cost the department incurs in connection with such out-of-state travel including, but not limited to, transportation, lodging, meals, employee travel time, telephone and FAX communication, courier service and any other reasonably related costs.

§81.13. Investigations.

(a) The Commissioner may, upon a finding of reasonable cause, investigate a person licensed under the Act to determine whether the person is complying with the Act and these regulations.

(b) The Commissioner may conduct an undercover or covert investigation only if the Commissioner, after due consideration of the circumstances, determines that the investigation is necessary to prevent immediate harm and to carry out the purposes of the Act.

(c) Reasonable cause will be deemed to exist if the Commissioner has received information from a source he or she has no reason to believe to be other than reliable, including documentary or other evidence or information, indicating facts which a prudent person would deem worthy of investigation as a violation of the Act.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. HEARINGS AND APPEALS

7 TAC §81.14

The new section is proposed under Finance Code, §157.011, which authorizes the Finance Commission to adopt rules as provided by Chapter 157 of the Act.

The section of the Act affected by the proposed section is Finance Code, §157.011, relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The proposed section relates to the following sections of the Finance Code: §§157.001, 157.002, 157.007, 157.008, 157.012, 157.015, 157.016, 157.020, and 157.021.

§81.14. Hearings and Appeals.

The Hearings Officer for the Finance Commission is designated as the hearings officer for hearings under this chapter. All such hearings are to be conducted in accordance with Chapter 9 of this title (relating to Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings), including, but not limited to motions for rehearing, notices of appeal, and applications for review. All such hearings shall, unless specifically authorized by the Commissioner, be conducted in Austin, Travis County, Texas. Such rules, as set forth in Chapter 9 of this title, are incorporated herein by reference for all purposes.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER G. ANNUAL CALL REPORTS

7 TAC §81.15

The new section is proposed under Finance Code, §157.011, which authorizes the Finance Commission to adopt rules as provided by Chapter 157 of the Act.

The section of the Act affected by the proposed section is Finance Code, §157.011. relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The proposed section relate to the following sections of the Finance Code: §§157.001, 157.002, 157.007, 157.008, 157.012, 157.015, 157.016, 157.020, and 157.021.

§81.15. Annual Call Reports.

(a) A mortgage banker who held a license anytime during the reporting year shall file an annual call report containing such information as the Commissioner may require regarding the residential mortgage lending activity of the banker and its residential mortgage loan originator employees. The annual call report shall be submitted on a form promulgated by the Commissioner at the time designated by the Commissioner.

(b) The Commissioner may prepare and make public a report summarizing the annual call reports provided by the licensees but shall treat each individual report and the information contained therein as confidential.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER H. RECOVERY FUND

7 TAC §81.16

The new section is proposed under Finance Code, §157.011, which authorizes the Finance Commission to adopt rules as provided by Chapter 157 of the Act.

The section of the Act affected by the proposed section is Finance Code, §157.011, relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The proposed section relates to the following sections of the Finance Code: §§157.001, 157.002, 157.007, 157.008, 157.012, 157.015, 157.016, 157.020, and 157.021.

§81.16. Recovery Fund.

(a) A designated portion of the mortgage banker and residential mortgage loan originator license and renewal fees, as determined by the Commissioner, shall be allocated to the Recovery Fund for the purpose of compliance with Finance Code, Chapter 180

(b) Administration of the Recovery Fund and any claims to the Recovery Fund against a residential mortgage loan originator shall be in accordance with the provisions of Chapter 156, Subchapter F of the Finance Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER I. INTERPRETATIONS

7 TAC §81.17

The new section is proposed under Finance Code, §157.011, which authorizes the Finance Commission to adopt rules as provided by Chapter 157 of the Act.

The section of the Act affected by the proposed section is Finance Code, §157.011, relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The proposed section relates to the following sections of the Finance Code: §§157.001, 157.002, 157.007, 157.008, 157.012, 157.015, 157.016, 157.020, and 157.021.

§81.17. Interpretations.

In order to provide clarification as to how the Act will be construed and implemented, the Commissioner may, from time to time, publish written interpretations of the Act and these regulations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER J. ENFORCEMENT OF LIENS

7 TAC §81.18

The new section is proposed under Finance Code, §157.011, which authorizes the Finance Commission to adopt rules as provided by Chapter 157 of the Act.

The section of the Act affected by the proposed section is Finance Code, §157.011, relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The proposed section relates to the following sections of the Finance Code: §§157.001, 157.002, 157.007, 157.008, 157.012, 157.015, 157.016, 157.020, and 157.021.

§81.18. Enforceability of Liens.

A violation of this chapter shall not render an otherwise lawfully taken lien unenforceable.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER K. SAVINGS CLAUSE

7 TAC §81.19

The new section is proposed under Finance Code, §157.011, which authorizes the Finance Commission to adopt rules as provided by Chapter 157 of the Act.

The section of the Act affected by the proposed section is Finance Code, §157.011, relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The proposed section relates to the following sections of the Finance Code: §§157.001, 157.002, 157.007, 157.008, 157.012, 157.015, 157.016, 157.020, and 157.021.

§81.19. Savings Clause.

If any portion or provision of this chapter is found to be illegal, invalid, or unenforceable, such illegality, invalidity, or lack of enforceability shall not affect or impair the legality, validity, and enforceability of the remainder thereof, all of which shall remain in full force and effect.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER A. GENERAL RULES

7 TAC §91.121

The Credit Union Commission (Commission) proposes amendments to §91.121, Complaint Notification. The proposed amendments incorporate the new requirements for complaint notification set out in §15.409, as amended by the 81st Legislature.

The amendments are proposed as a result of legislation passed with the review of the Credit Union Department by the Sunset Commission.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §15.409, which directs the Commission to establish methods for credit unions to notify consumers and service recipients how to file a complaint with the Department.

The specific section affected by the proposed amended rule is Texas Finance Code, §15.409.

§91.121. Complaint Notification.

(a) Definitions.

(1) "Privacy notice" means any notice which a credit union gives regarding a member's right to privacy, as [~~regardless of whether it is~~] required by a state or federal law [~~or given voluntarily~~].

(2) For purposes of subsection (b) of this section and unless the context reads otherwise, "notice" means a complaint notification in the form set forth in subsection (b)(1) of this section.

(b) Required Notice.

(1) Credit unions must provide their members with the following notice describing the process for filing complaints: "This credit union is incorporated under the laws of the State of Texas and under state law is subject to regulatory oversight by the Texas Credit Union Department. If you have a dispute with (Your Name) Credit Union, you should first contact the credit union. If the dispute is not resolved to your satisfaction, you may [~~Any member wishing to~~] file a complaint against the credit union by contacting [~~should contact~~] the Texas Credit Union Department through one of the means indicated below: By [~~In person or by~~] U.S. Mail: 914 East Anderson Lane, Austin, Texas 78752-1699, Telephone Number: (512) 837-9236, [~~Fax Number: (512) 832-0278, E-mail: complaints@tcud.state.tx.us,~~] Website: www.tcud.state.tx.us.

(2) The title of this notice shall be "COMPLAINT NOTICE" and must be in all capital letters and boldface type.

(3) [~~(2)~~] The credit union must provide the notice as follows:

(A) In each office where a credit union typically conducts business on a face-to-face basis, the notice, in the form specified in paragraph (1) of this subsection, must be conspicuously posted. A notice is deemed to be conspicuously posted if a member with 20/20 vision can read it from the place where he or she would typically conduct business or if it is included in plain view on a bulletin board on which required communications to the membership (such as equal housing posters) are posted.

~~[(B) The notice must be included with each privacy notice the credit union gives or sends to its members.]~~

(B) [~~(C)~~] If a credit union maintains a website, it must include the notice or a link to the notice in a reasonably conspicuous place on the website.

(C) If a credit union distributes a newsletter, it must include the notice in any newsletter distributed to its members.

(D) If a credit does not have an Internet website or does not distribute a newsletter, the notice must be included as a separate page with any privacy notice the credit union is required to give or send its members.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200904730
Harold E. Feeney
Commissioner
Credit Union Department
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For further information, please call: (512) 837-9236

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SUBCHAPTER D. POWERS OF CREDIT UNIONS

7 TAC §91.401

The Credit Union Commission (Commission) proposes amendments to §91.401, Purchase, Lease, or Sale of Fixed Assets. The proposed amendments add new definitions, reorganize the rule for clarity, and add a requirement for board of director approval before a credit union can sell an asset to or purchase an asset from an immediate family member. The amendments add definitions for immediate family member, real property, and senior management employee, and further describe the contents of an application for waiver of fixed asset limits.

The amendments are proposed as a result of the Credit Union Department's general rule review and to clarify requirements.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §123.103, which permits credit unions to purchase, hold, lease, or dispose of property necessary or incidental to the operation or purpose of the credit union, subject to Commission rules.

The specific section affected by the proposed amended rule is Texas Finance Code, §123.103.

§91.401. Purchase, Lease, or Sale of Fixed Assets.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. [~~For the purposes of this rule, the term "fixed assets" means real property, premises, and furniture, fixtures and equipment as defined herein. Premises include real property with any improvements or leasehold interest where the credit union transacts or intends to transact business. Furniture, fixtures and equipment includes all office furnishings (e.g. tables, chairs, desks, file cabinets, curtains, drapes, rugs, etc.), office machines, word processing equipment, computer hardware and software, automated terminals, and heating and cooling equipment. The term does not extend to any real property which may be conveyed to the credit union in satisfaction of debts previously contracted in the course of business, nor to such real estate as the credit union shall purchase at sale on judgments, decrees, mortgage or deed of trust foreclosures under a security agreement held by the credit union, but a credit union shall not bid at such sale a larger amount than is necessary to satisfy the debts and costs owed the credit union.~~]

(1) Fixed Assets--real property, premises, furniture, fixtures and equipment.

(2) Furniture, fixtures, and equipment--all office furnishings, office machines, computer hardware and software, automated terminals, and heating and cooling equipment, including capitalized leases of such items.

(3) Immediate family member--a spouse or other family member living in the same household.

(4) Premises--any office, service center, parking lot, or other facility where the credit union transacts or intends to transact business. It also includes capitalized leases, leasehold improvements, and remodeling costs to existing premises.

(5) Real property--land and anything growing on, attached to, or erected on it that is acquired and intended primarily for the credit union's own use in conducting business. It does not include any real property which may be conveyed to the credit union in satisfaction of debts previously contracted in the course of business, nor any real estate that the credit union purchases at sale on judgments, decrees, mortgage or deed of trust foreclosures under a security agreement held by the credit union.

(6) Senior Management Employee--the chief executive officer, any assistant chief executive officers (e.g. vice presidents and above) and the chief financial officer.

(b) Fixed Asset Investment Limitations. A credit union may purchase fixed assets or enter into a contract for the purchase or lease of fixed assets primarily for its own use in conducting business if the aggregate of all such investments does not exceed the lesser of 70% of the credit union's retained earnings or six percent of total assets.

(c) Restrictions.

(1) A credit union shall not purchase real estate (land or buildings) for the principal purpose of engaging in real estate rentals or speculation.

(2) A credit union bidding at a foreclosure or similar sale shall not bid a larger amount than is necessary to satisfy the debts and costs owed the credit union.

(d) Transactions with insiders. Without the prior approval of a disinterested majority of the board of directors recorded in the minutes or, if a disinterested majority cannot be obtained, the prior written approval of the commissioner, a credit union may not directly or indirectly:

(1) sell or lease an asset of the credit union to a director, committee member, or senior management employee, or immediate family members of such individual [~~executive staff~~]; or

(2) purchase or lease an asset in which a director, committee member, senior management employee, or immediate family members of such individual [~~staff~~] has an interest.

(e) Use requirement. If real property or leasehold interest is acquired and intended, in good faith, for use in future expansion, the credit union must partially satisfy the "primarily for its own use in conducting business" requirement within five years after the credit union makes the investment.

(f) Waiver. The commissioner may, upon written application, waive or modify any of the limitations or restrictions placed on the investment of fixed assets.

(g) Written application. A credit union requesting a waiver or modification of the fixed asset investment limits, shall submit [~~such~~] statements and reports required by [~~as~~] the commissioner, including [~~may, in his discretion, require in support of a waiver or modification~~

~~of the limits imposed upon the investment of fixed assets. Such reports and statements shall include~~] but not [~~be~~] limited to:

(1) a description of the proposal's [~~proposal in terms of~~] cost, usage, location, and method of financing;

(2) a statement of the business reasons for making the investment and the economic advantages [~~advantage~~] and disadvantages relating to the proposed investment;

(3) evidence that the increase in operating expenses caused by the project can be supported after accounting for the current level of expenses and dividend commitments; and

(4) the credit union's latest balance sheet, income statement and loan delinquency report.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Harold E. Feeney
Commissioner
Credit Union Department
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For further information, please call: (512) 837-9236

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7 TAC §91.402

The Credit Union Commission (Commission) proposes amendments to §91.402, Insurance for Members. The proposed amendments add language that emphasizes that a member's purchase of insurance must be voluntary, and revise the language of the rule for clarity. The amendments also add a new subsection which notifies credit unions that it is an unsafe and unsound practice for a director, officer or employee of a credit union who is involved in the sale of insurance products to benefit financially from the sale of insurance products to a member.

The amendments are proposed as a result of the Credit Union Department's general rule review and to clarify certain prohibitions.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §123.107, which allows credit unions to purchase or provide insurance for the benefit or convenience of its members in accordance with rules adopted by the Commission.

The specific section affected by the proposed amended rule is Texas Finance Code, §123.107.

§91.402. Insurance for Members.

(a) Authority. A credit union may make insurance products [~~programs~~] available to its members, including insurance products [~~programs~~] at the individual member's [~~own~~] expense, subject to [~~if~~] the following conditions [~~are complied with~~]:

(1) Except as provided in paragraphs (2) and (3) of this subsection, the [~~The~~] purchase of any type of insurance coverage by a member must be [~~is~~] voluntary, [~~except as provided in paragraphs (2) and (3) of this subsection,~~] and a copy of the signed and dated written election to purchase the insurance must be [~~is~~] on file at the credit union.

(2) Insurance may be required on a loan if the coverage and the charges for the insurance bear a reasonable relationship to:

(A) the value of the collateral;

(B) the existing hazards or risk of loss, damage, or destruction; and

(C) the amount, term, and conditions of the loan.

(3) if the insurance is a condition of a loan, the credit union shall give the member written notice that clearly and conspicuously states:[~~;~~]

(A) [~~the credit union shall give the member written notice that clearly and conspicuously states~~] that insurance is required in connection with the loan; and

(B) that the member [~~who is borrowing~~] may purchase or provide the insurance from a carrier of the member's choice, or the member [~~who is borrowing~~] may assign any existing insurance coverage.

(4) An officer, director, employee, or committee member of a credit union may not accept anything of value from an insurance agent, insurance company, or other insurance provider offered to [~~corruptly~~] induce the credit union to sell or offer to sell insurance or other related products or services to the members of the credit union.

(5) If a credit union replaces an existing loan or renews a loan and sells the member new credit life or disability insurance, the credit union shall cancel the prior insurance and provide the member with a refund or credit of the unearned premium or identifiable charge before selling the new insurance to the member.

(6) The person selling or offering for sale any insurance product in any part of a credit union's office or on its behalf must be [~~is~~] at all times appropriately qualified and licensed under applicable State insurance licensing standards with regard to the specific products being sold or recommended.

(b) Unsafe and Unsound Practice. It is an unsafe and unsound practice for any director, officer, or employee of a credit union, who is involved in the sale of insurance products to members, to take advantage of that business opportunity for personal profit. Recommendations to members to buy insurance should be based on the benefits of the policy, not the compensation received from the sale.

(c) Prohibited Practices. A director, officer, or employee of a credit union may not engage in any practice that would lead a member to believe that a loan or extension of credit is conditional upon either:

(1) The purchase of an insurance product from the credit union of or any of its affiliates; or

(2) An agreement by the member not to obtain, or a prohibition on the member from obtaining, an insurance product from an unaffiliated entity.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

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Harold E. Feeney
Commissioner
Credit Union Department
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7 TAC §91.403

The Credit Union Commission (Commission) proposes amendments to §91.403, Federal Parity Debt Cancellation Products. The proposed amendments rename the rule Debt Cancellation Products: Federal Parity; clarify the nature of debt cancellation products as loan, rather than insurance, products; elaborate on the risk management policy requirements; and revise the language of the rule for clarity. Further, although the Commission believes that the purchase of insurance is an appropriate risk mitigation practice, the proposed amendment removes the requirement. Each credit union can now decide whether to purchase insurance to indemnify the credit union for losses resulting from offering the product. This puts credit unions on parity with federal credit unions.

The amendments are proposed as a result of the Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §123.003, which authorizes credit unions to engage in any activity in which it could engage if it were operating as a federal credit union, and §124.001, which authorizes credit unions to make loans to members.

The specific sections affected by the proposed amended rule are Texas Finance Code, §123.003 and §124.001.

§91.403. [~~Federal Parity~~] Debt Cancellation Products: Federal Parity.

(a) Authority. Provided it complies with this section, a [~~A~~] credit union may offer any debt cancellation product [~~it could offer if it were operating as~~] a federal credit union is permitted to offer[~~, so long as it complies with this section~~]. For the purposes of this section, a debt cancellation product is a two-party [~~an~~] agreement between the credit union and the member under which the credit union agrees to waive, suspend, defer, or cancel all or part of a member's obligation to pay an indebtedness under a lease, loan, or other extension of credit upon the occurrence of a specified event. Debt cancellation products are considered loan products, not insurance products and, consequently, are not regulated by the Texas Department of Insurance. The credit union may offer debt cancellation products for a fee. If the debt cancellation product is offered for [~~on~~] a fee basis, then the member's participation must be optional [~~for the member~~].

(b) Anti-tying and Refund Rules. For any debt cancellation product offered by a credit union:

[~~(1) The credit union must purchase insurance, from an insurer authorized to do business in Texas, to indemnify itself from loss resulting from operation of the product;~~]

(1) [~~(2)~~] The credit union may not extend credit nor alter the terms or conditions of an extension of credit conditioned upon the member entering into [~~choosing~~] a debt cancellation product with the credit union; and

(2) [~~(3)~~] The debt cancellation product must provide for [~~the~~] refunding [~~of,~~] or crediting to[~~,~~] the member any unearned fees resulting from termination of the member's participation in the product, whether by prepayment of the extension of credit or otherwise. Any unearned fees must be calculated using a method that produces a result at least as favorable to the member as the actuarial method. Before the member purchases the debt cancellation product, the [~~The~~] credit union must state [~~disclose,~~] in writing[~~, prior to purchase of the debt cancellation product~~] that the purchase of the debt cancellation product is optional, [~~;~~] the conditions for and method of calculating any refund of the debt cancellation fee, including when fees are considered earned by the credit union, and[~~;~~] that the member should carefully review all of the terms and conditions of the debt cancellation agreement prior to signing the agreement.

(c) Notice to Department. A credit union must notify the commissioner in writing of its intent to offer any type of debt cancellation product at least 30 days prior to the [~~any such~~] product being offered to members. The notice must contain[~~:~~]

[~~(1)~~] a [~~A~~] statement describing the type(s) of debt cancellation product(s) that the credit union will offer to its membership.[~~; and~~]

[~~(2) The name of the insurer from whom the credit union will purchase the insurance policy required under subsection (b)(1) of this section.~~]

(d) Risk Management and Controls. Before offering any debt cancellation products, each [~~Each~~] credit union's board of directors [~~union, before offering any debt cancellation products~~], shall adopt written policies [~~approved by its board of directors~~] that establish and maintain effective risk management and control processes for [~~over the offering of~~] these products. Such processes include appropriate recognition and financial reporting of income, expenses, assets and liabilities, and appropriate treatment of all expected and unexpected losses associated with the products. A credit union should also assess the ad-

equacy of its internal control and risk mitigation activities in view of the nature and scope of its debt cancellation program. In addition, the [~~The~~] policies shall [~~also~~] establish reasonable fees, if any, that will be charged,[~~:~~] the appropriate disclosures that will be given, [~~:~~] and the claims processing procedures that will be utilized.

(e) For purposes of this section "actuarial method" means the method of allocating payments made on a debt between the amount financed and the finance charge pursuant to which a payment is applied first to the accumulated finance charge and any remainder is subtracted from, or any deficiency is added to, the unpaid balance of the amount financed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

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Harold E. Feeney
Commissioner
Credit Union Department
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For further information, please call: (512) 837-9236

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7 TAC §91.404

The Credit Union Commission (Commission) proposes new §91.404, Purchasing Assets and Assuming Deposits and Liabilities of Another Financial Institution. The proposed new rule requires a credit union to seek authorization from the Credit Union Department (Department) to purchase all or substantially all of the assets, or to assume the deposits and liabilities, of another financial institution. The new rule sets out the process for gaining that approval and outlines the factors the Department will consider when evaluating the application.

The new rule is proposed to allow the Department notice and oversight of a major transaction that can have significant impact on the safety and soundness of a credit union.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Loar has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the rule. There is no economic cost anticipated to credit unions or individuals for complying with the rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The new rule is proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §123.103 which authorizes a credit union to purchase property, subject to Commission rules, and §124.351 which permits a credit union to invest in assets of a state or federal credit union.

The specific sections affected by the proposed new rule are Texas Finance Code, §123.103 and §124.351.

§91.404. Purchasing Assets and Assuming Deposits and Liabilities of Another Financial Institution.

(a) Scope. A credit union must obtain the approval of the Department before purchasing all or substantially all of the assets and/or assuming certain deposits and other liabilities of another financial institution. This section does not apply to purchases of assets that occur as a result of a credit union's ordinary and ongoing business of acquiring obligations of its members.

(b) Approval Requirement.

(1) A credit union must file an application and obtain the written approval of the Department before entering into any type of purchase and assumption agreement.

(2) In determining whether to approve an application under this section, the Department will consider the purpose of the transaction, its impact on the safety and soundness of the credit union, and any effect on the credit union's existing members. The Department may deny the application if the transaction would have a negative effect on any of those factors.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

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Harold E. Feeney
Commissioner
Credit Union Department
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CHAPTER 97. COMMISSION POLICIES AND ADMINISTRATIVE RULES
SUBCHAPTER E. ADVISORY COMMITTEES

7 TAC §97.401

The Credit Union Commission (Commission) proposes new §97.401, Advisory Committees. The proposed new rule establishes guidelines for the purpose, structure, use, and evaluation of an advisory committee established by the Commission.

The new rule is proposed as a result of legislation passed with the review of the Credit Union Department by the Sunset Commission.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Loar has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the rule. There is

no economic cost anticipated to credit unions or individuals for complying with the rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The new rule is proposed under Texas Finance Code, §15.501, which directs the Commission to adopt rules regarding the purpose, structure, and use of advisory committees and §15.502 which directs the Commission to establish a process to evaluate an advisory committee.

The specific sections affected by the proposed new rule are Texas Finance Code, §15.501 and §15.502.

§97.401. General Requirements.

(a) Definition. For purposes of this rule, the term "advisory committee" means a committee, council, board, task force, or other entity with multiple members established to provide advice and counsel to the commission.

(b) Creation. The commission may establish advisory committees to advise the commission on issues within the jurisdiction of the department.

(c) Function. Unless otherwise provided by law, an advisory committee's responsibility is limited to those matters about which advice or counsel is sought. An advisory committee will have no authority to make rules or establish department policy.

(d) Expiration of advisory committee. Unless expressly provided in this subchapter or other law, an advisory committee will expire on the fourth anniversary of the date of its creation. The date of creation shall be the effective date of the rule establishing the advisory committee.

(e) Membership and Quorum. The chairman may appoint a maximum of 24 individuals to serve on an advisory committee. A majority of those individuals shall constitute a quorum. Unless otherwise provided by specific statute, the appointments shall be balanced to ensure representation of credit unions regulated by the department and consumers of services provided by those credit unions. Each advisory committee shall include at least one department employee as an ex officio member. This employee shall not be considered a committee member for purposes of establishing the maximum number of members or for purposes of determining a quorum.

(f) Term of members. Unless expressly provided in this subchapter or other law, each member of an agency advisory committee will serve a term of four years. The terms may be staggered. Members' terms will expire at the end of four years or upon the termination of the advisory committee, whichever is earlier. Members may be reappointed. Members serve at the will of the chairman and may be removed at any time by the chairman.

(g) Presiding officer. The presiding officer of each advisory committee shall be selected by the members of the advisory committee from its membership. The chairman may make a recommendation to the advisory committee regarding the presiding officer.

(h) Meetings. Meetings shall be subject to the requirements of Chapter 551 of the Government Code. Each committee shall meet at least annually, but may meet as often as necessary. The department ex officio member of each advisory committee shall work with the presiding officer to schedule advisory committee meetings and provide adequate notice to department staff and to other members.

(i) Reports. On or before October 1 of each year, each advisory committee shall submit a report to the commission. Upon receipt of the report, the commission shall evaluate the advisory committee's work, usefulness, and costs related to the committee's existence, including the cost of department staff time spent in support of the committee's activities. Each report shall include the following:

(1) a summary or minutes of meetings conducted during the previous fiscal year (September 1-August 31);

(2) a summary of recommendations from the advisory committee; and

(3) other information determined by the advisory committee or the chairman to be appropriate and useful.

(j) Expenses. Members of each advisory committee will serve without compensation or reimbursement for travel or other out-of-pocket expenses.

(k) Rules. For each advisory committee appointed, the commission shall adopt rules that address the purpose of the advisory committee and membership qualifications, including experience requirements, geographic representation, and training requirements. Such rules may also address the terms of service, operating procedures, and other standards to ensure the effectiveness of an advisory committee appointed under this subchapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

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Harold E. Feeney
Commissioner
Credit Union Department
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For further information, please call: (512) 837-9236

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 60. COMPLIANCE ADMINISTRATION

SUBCHAPTER A. COMPLIANCE MONITORING

10 TAC §60.102, §60.105

The Texas Department of Housing and Community Affairs proposes amendments to Chapter 60, Subchapter A, §60.102 and §60.105 concerning Compliance Monitoring. The proposed amendments make changes to the definition of substantial construction, and the reporting requirements for periodic unit status reports.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the amended sections are in effect, there will be no fiscal implications for state or local governments as

a result of enforcing or administering the amended sections as proposed.

Mr. Gerber has also determined that for each year of the first five-years the amended sections are in effect, the public benefit anticipated as a result of enforcing the amended sections will be the more efficient organization and use of Department resources. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the amended sections as proposed.

The public comment period will be held between October 30. 2009 to November 30, 2009 to receive public input on the amendments to these sections. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2010 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 469-9606. ALL COMMENTS MUST BE RECEIVED BY NOVEMBER 30, 2009.

The amended sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

The amended sections affect no other code, article, or statute.

§60.102. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affordability Period--The Affordability Period commences as specified in the Land Use Restriction Agreement (LURA) or federal regulation, or commences on the first day of the Compliance Period as defined by §42(i)(1) of the Internal Revenue Code (IRC) and continues through the appropriate program's affordability requirements or termination of the LURA, whichever is earlier. The term of the Affordability Period shall be imposed by the LURA or other deed restriction and may be terminated upon foreclosure. The Department reserves the right to extend the Affordability Period for HOME properties that fail to meet program requirements. During the Affordability Period the Department shall monitor to ensure compliance with programmatic rules, regulations, and Application representations.

(2) Application--An Application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material. (§2306.6702)

(3) Architect of Record--The architect licensed in the jurisdiction that the project is located in, who prepares, stamps and signs the construction documents, and is legally recorded as the architect for the project.

(4) Board--The governing Board of the Texas Department of Housing and Community Affairs.

(5) Code--The U.S. Internal Revenue Code of 1986, as amended from time-to-time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued by the United States Department of the Treasury or the Internal Revenue Service.

(6) Compliance Period--With respect to a Housing Tax Credit building, the period of fifteen (15) taxable years, beginning with the first year of the Credit Period, pursuant to the Code §42(i)(1).

(7) Continuously Occupied--The same household has resided in the Unit for at least twelve (12) months.

(8) Credit Period--With respect to a Housing Tax Credit building, the period of ten (10) taxable years, beginning with the taxable year the building is placed in service or at the election of the Development Owner, the succeeding taxable year, as more fully defined in the Code §42(f)(1).

(9) Department--The Texas Department of Housing and Community Affairs, an official and public agency of the State of Texas pursuant to Chapter 2306, Texas Government Code.

(10) Development--A property or work or a project, building, structure, facility, or undertaking, whether existing, new construction, remodeling, improvement, or rehabilitation, that meets or is designed to meet minimum property standards required by the Department and that is financed under the provisions of Chapter 2306, Texas Government Code.

(11) Extended Use Period--With respect to a Housing Tax Credit building, the period beginning on the first day of the Compliance Period and ending the later of:

(A) the date specified in the Land Use Restriction Agreement, or

(B) the date which is fifteen (15) years after the close of the Compliance period.

(12) Historically Underutilized Business (HUB)--Any entity defined as a historically underutilized business with its principal place of business in the State of Texas in accordance with Chapter 2161, Texas Government Code.

(13) Housing Quality Standards--The property condition standards described in 24 CFR §982.401.

(14) HTC Development--Sometimes referred to as "HTC Property." A Development using Housing Tax Credits allocated by the Department.

(15) HUD--The United States Department of Housing and Urban Development.

(16) HUD-regulated Building--The rents and utility allowances of the building are reviewed by HUD on an annual basis.

(17) Low Income Unit--A Unit that is intended for occupancy by an income eligible household, as defined by the Department or the Code.

(18) Land Use Restriction Agreement or LURA--An agreement between the Department and the Development Owner which is a binding covenant upon the Development Owner's successors in interest that encumbers the Development with respect to the requirements of Chapter 2306 of the Texas Government Code, the Code, and the requirements of the various programs administered or funded by the Department.

(19) Material Noncompliance--

(A) A Housing Tax Credit Development located within the state of Texas will be classified by the Department as being in Material Noncompliance status if the noncompliance score for such Development is equal to or exceeds a threshold of 30 points in accordance with the Material Noncompliance provisions, methodology, and point system of this title.

(B) Non HTC Developments monitored by the Department with 1 to 50 Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 30 points. Non HTC Developments monitored by the Department with 51 to 200 Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score

is equal to or exceeds a threshold of 50 points. Non HTC Developments monitored by the Department with 201 or more Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 80 points.

(C) For all programs, a Development will be in Material Noncompliance if the noncompliance is stated in §60.121 of this chapter to be Material Noncompliance.

(20) Non HTC Development--Sometimes referred to as Non HTC Property. Any Development not utilizing Housing Tax Credits.

(21) Owner--An individual, joint venture, partnership, limited partnership, trust, firm, corporation, limited liability company, other form of business organization or cooperative that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a housing Development, subject to the regulatory powers of the Department and other terms and conditions.

(22) Substantial Construction--

(A) The minimum activity necessary to meet the requirements of substantial construction for new construction Developments will be defined as:

(i) Delivery of an executed partnership agreement with the investor;

(ii) Delivery of the executed construction loan and construction loan agreement;

(iii) completion of the foundation of the clubhouse (if applicable);

(iv) having all infrastructure permits;

(v) all grading completed (not including landscaping);

(vi) all necessary utilities available at the property; [~~and~~]

(vii) all Right of Way access; and [~~one of the following:~~]

(viii) [~~(I)~~] 10 percent [~~20 percent~~] of the construction contract amount for the development expended, adjusted for any change orders and certified by the inspecting architect.[~~; or~~]

~~*(II)* 100 percent of the foundations in place and 50 percent of the framing completed; or~~]

~~*(III)* 25 percent of all residential buildings roofed.~~]

(B) The minimum activity necessary to meet the requirement of Commencement of Substantial Construction for rehabilitation Developments will be defined as having:

(i) building permits issued or a clearance from the City stating that building permits are not required;

(ii) a certification that there are no reasonably foreseeable issues or circumstances which may prevent or delay the start and progress of construction or the timely successful completion of rehabilitation; and

(iii) at least 20 percent of the construction budget expended as documented by the inspecting architect.

(23) Unit--Any residential rental Unit in a Development consisting of an accommodation, including a single room used as an accommodation on a non-transient basis that contains complete physical facilities and fixtures for living, sleeping, eating, cooking, and sanitation.

(24) Unit Type--Units will be considered different Unit Types if there is any variation in the number of bedroom, bathrooms or a square footage difference equal to or more than 120 square feet. *Example 102(1):* A two bedroom one bath Unit is considered a different Unit Type than a two bedroom two bath Unit. A three bedroom two bath Unit with 1,000 square feet is considered a different Unit Type than a three bedroom two bath Unit with 1,200 square feet. A one bedroom one bath Unit with 700 square feet will be considered equivalent to a one bedroom, one bath Unit with 800 square feet.

(25) UPCS--Uniform Physical Condition Standards as developed by the Real Estate Assessment Center of the Department of Housing and Urban Development.

§60.105. Reporting Requirements.

(a) The Department requires reports to be submitted electronically through the Department's web-based Compliance Monitoring and Tracking System (CMTS) and in the format prescribed by the Department. The Electronic Compliance Reporting Filing Agreement and the Owner's Designation of Administrator of Accounts forms must be filed no later than September 1st of the year following the award. The Department will provide general instruction regarding the electronic transfer of data. Under special circumstances, the Department may, at its discretion, waive the online reporting requirements where a hardship can be demonstrated. In the absence of a written waiver, all Developments are required to submit reports online.

(b) Each Development is required to submit an Annual Owner's Compliance Report (AOCR). Depending on the property, some or all of the Report must be submitted. The first AOCR is due the second year following the award. For example, if a Development is awarded funds in calendar year 2007, the first report is due in 2009. The AOCR is comprised of 4 sections:

(1) Part A "Owner's Certification of Program Compliance." All Development Owners must annually certify to compliance with applicable program requirements. The AOCR Part A shall include answers to all questions required by Treasury Regulation 1.42-5(b)(1) or the applicable program rules. In addition, Owners are required to report on the race and ethnicity, family composition, age, income, use of rental assistance, disability status, and monthly rental payments of individuals and families applying for and receiving assistance. Housing Tax Credit (HTC) developments during the Compliance Period will also be required to provide the name and mailing address of the syndicator in the Annual Owner's Compliance Report.

(2) Part B "Unit Status Report." All Developments must annually report the information related to individual household income, rent, certification dates and other necessary data to ensure compliance with applicable program regulations.

(3) Part C "Housing for Persons with Disabilities." The Department must establish a system that requires Owners of state or federally assisted housing Developments with 20 or more housing Units to report information regarding housing Units designed for persons with disabilities. The questions on Part C satisfy this requirement.

(4) Part D "Owner's Financial Certification." Developments funded by the Department must annually provide the data requested in the Owner's Financial Certification.

(c) Parts A, B and C of the Annual Owner's Compliance Report must be provided to the Department no later than March 1st of each year, reporting data current as of December 31st [~~31~~] of the previous year (the reporting year). Part D, "Owner's Financial Certification", which includes the current audited financial statements and income and

expenses of the Development for the prior year, must be submitted to the Department no later than the last day of April each year.

(d) Any Development for which the AOCR, Part A, "Owner's Certification of Program Compliance," is not received or is received past the due date will be considered not in compliance with this section. If Part A is incomplete, improperly completed, or is not submitted by the Development Owner, it will be considered not received and not in compliance with this section. The Department will report to the IRS on Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition, any HTC Development that fails to comply with this requirement.

(e) Department staff will review Part A of the AOCR for compliance with the requirements of the appropriate program. If it appears that the Development is not in compliance based upon the report, the Owner will be given written notice and provided a corrective action period to clarify or correct the report. If the Owner does not respond to the notice, the report will be subject to the sanctions listed in subsections (f) and (g) of this section.

(f) If any required section, or sections (Parts A, B, C or D), of the report are not received on or before the deadline for submission specified in subsection (c) of this section, a notice of noncompliance will be sent to the Owner, specifying a corrective action deadline. If the report is not received on or before the corrective action deadline, the Department shall:

(1) For all HTC properties, issue Form 8823 notifying the Internal Revenue Service of the violation.

(2) For all properties, score the noncompliance in accordance with §60.121 of this chapter.

(g) The Department may assess and enforce the following sanctions against an Owner who fails to submit the AOCR on or before March 1 of each year. These sanctions will be assessed for multiple, consistent, and/or repeated violations of failure to submit the AOCR by March 1 of each year:

(1) A late processing fee in an amount equal to $1,000;

(2) An HTC Development that fails to submit the required AOCR for three (3) consecutive years may be reported to the Internal Revenue Service as no longer in compliance and never expected to comply.

(h) Periodic Unit Status Reports. All Developments must submit a quarterly Unit Status report to the Department through the Compliance Monitoring and Tracking System. Quarterly reports are due in January, March, June and October on the 10th day of the month. The report must show occupancy as of the last day of the previous month for the reporting period. For example, the report due October 10th should report occupancy as of September 30th. The first quarterly report is due January 10, 2010. [~~HOME, Housing Trust Fund, and properties funded under the Department's CDBG Disaster Recovery Program shall provide tenant information provided on Part B, "Unit Status Report," at least quarterly during lease up and until occupancy requirements are achieved. Once the Department determines that all occupancy requirements are met, the Development shall submit the Unit Status Report at least annually and as required by this section.~~]

~~[(i) Developments financed by Tax Exempt Bonds issued by the Department shall report quarterly throughout the Qualified Project Period unless notified by the Department of a change in the reporting frequency.]~~

(i) [~~(j)~~] Owners are encouraged to continuously maintain current resident data in the Department's Compliance Monitoring and Tracking System. Under certain circumstances, such as in the event of a natural disaster, the Department may require all Developments to provide current occupancy data through CMTS.

(j) [~~(k)~~] All rental Developments funded or administered by the Department will be required to submit a current Unit Status Report prior to an onsite monitoring visit.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904728
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 475-3916

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PART 6. TEXAS DEPARTMENT OF RURAL AFFAIRS

CHAPTER 257. STATE OFFICE OF RURAL HEALTH

SUBCHAPTER B. TEXAS OUTSTANDING RURAL SCHOLAR RECOGNITION PROGRAM

10 TAC §257.26

The Texas Department of Rural Affairs (the Department) proposes amendments to §257.26(2)(C)(i) to authorize, rather than require, the Department to extend one semester of academic grace to students placed on academic probation under the Texas Outstanding Rural Scholar Recognition Program.

Charles S. (Charlie) Stone, Executive Director of the Department, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section as proposed.

Mr. Stone has also determined that for each year of the first five-year period the section is in effect the public benefit as a result of enforcing the section will be the greater flexibility in handling student breaches of contract under the Texas Outstanding Rural Scholar Recognition Program. There will be no cost to small business or individuals.

Comments on the proposal may be submitted to Ms. Theresa Cruz, Director of the State Office of Rural Health and Compliance, Texas Department of Rural Affairs, P.O. Box 12877, Austin, TX 78711, telephone: (512) 936-6719. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register.*

The amendments are proposed under §487.052 of the Government Code which authorizes the Department to adopt rules as necessary to implement Chapter 487.

No other code, article, or statute is affected by the proposed section.

§257.26. Breach of Contract.

A contract executed under this subchapter between the Office, the sponsor and the student is a binding contract.

(1) (No change.)

(2) Student.

(A) - (B) (No change.)

(C) The student shall be considered in breach of contract and shall not be eligible to receive forgiveness loan funds if the student fails to meet any of the conditions of this subchapter. The student shall notify the Office in writing within two weeks of any change in status. The student shall be in breach of contract if the student:

(i) fails to maintain satisfactory academic progress according to the academic institution the student attends except that one academic term of grace may [~~will~~] be extended to the student if the student is placed on scholastic probation during which time the student may receive a loan disbursement;

(ii) - *(xii)* (No change.)

(D) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 14, 2009.

TRD-200904640
Charles S. (Charlie) Stone
Executive Director
Texas Department of Rural Affairs
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 936-6726

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 1. LIBRARY DEVELOPMENT SUBCHAPTER F. SYSTEM ADVISORY COUNCIL

13 TAC §§1.111 - 1.120, 1.123

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Library and Archives Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas State Library and Archives Commission proposes repeal of 13 TAC §§1.111 - 1.120 and 1.123 regarding the administrative operation of major resource system advisory councils.

The 81st Legislature has approved new statutory language (HB 3756) authorizing larger councils, eliminating the requirement for lay representatives, and directing the agency to adopt rules on the administrative operation of advisory councils as guidance for systems to use in developing their by-laws. The changes are numerous and require repeal of the existing rules and adoption of new rules.

Deborah Littrell, Library Development Division Director, has determined that for each year of the first five years after the repeal is in effect, there will be no fiscal implications for state or local governments. Ms. Littrell does not anticipate either a loss of, or an increase in, revenue to state or local government as a result of the proposed repeal. The public benefit of the proposed repeal is that they will help establish the operation of major resource system advisory councils. There will be no impact on small businesses, micro-businesses, or individuals as a result of enforcing the repeal.

Written comments on this proposal may be submitted to Deborah Littrell, Director, Library Development Division, Texas State Library and Archives Commission, Box 12927, Austin Texas 78711-2927, fax (512) 463-8800, or email Deborah.littrell@tsl.state.tx.us.

These repealed sections are proposed under the authority of Government Code §441.123 that directs the commission to establish and develop a state library system, §441.136 that authorizes the director and librarian to propose rules necessary for the administration of the program, and §441.130 that authorizes the commission to adopt rules on the administrative operation of advisory councils.

The proposed repeal affects Government Code §§441.123, 441.136, and 441.130.

§1.111. Advisory Council.
§1.112. Advisory Council Election.
§1.113. Advisory Council Terms of Office.
§1.114. Advisory Council Officers.
§1.115. Geographical Representation.
§1.116. Council Officers, Not Reappointed as Library Representative.
§1.117. Advisory Council Vacancies.
§1.118. Federated County and Multicounty Representation.
§1.119. Council Review and Approval Process.
§1.120. Disqualification of Council Members.
§1.123. Voting by Member Library Representatives.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904733
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 463-5459

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13 TAC §§1.111 - 1.121, 1.123

The Texas State Library and Archives Commission proposes new §§1.111 - 1.121 and 1.123, regarding the administrative operation of major resource system advisory councils.

The 81st Legislature has approved new statutory language (HB 3756) authorizing larger councils, eliminating the requirement for

lay representatives, and directing the agency to adopt rules on the administrative operation of advisory councils as guidance for systems to use in developing their by-laws. The changes are numerous and require repeal of the existing rules and adoption of new rules.

Deborah Littrell, Library Development Division Director, has determined that for each year of the first five years after the new section is in effect, there will be no fiscal implications for state or local governments. Ms. Littrell does not anticipate either a loss of, or an increase in, revenue to state or local government as a result of the proposed new section.

Ms. Littrell has also determined the public benefit of the proposed new rules is that they will help establish the operation of major resource system advisory councils. There will be no impact on small businesses, micro-businesses, or individuals as a result of enforcing the new section.

Written comments on this proposal may be submitted to Deborah Littrell, Director, Library Development Division, Texas State Library and Archives Commission, Box 12927, Austin Texas 78711-2927, fax (512) 463-8800, or email Deborah.littrell@tsl.state.tx.us.

These new sections are proposed under the authority of Government Code §441.123 that directs the commission to establish and develop a state library system, §441.136 that authorizes the director and librarian to propose rules necessary for the administration of the program, and §441.130 that authorizes the commission to adopt rules on the administrative operation of advisory councils.

The proposed new sections affect Government Code §§441.123, 441.136, and 441.130.

§1.111. Advisory Council.

An advisory council for each major resource system shall be established with not more than twelve and not less than six members representing the member libraries of the system.

§1.112. Member Library Representatives.

Library directors of accredited libraries shall designate a member library representative and one alternate. Representatives may include board members, others qualified by knowledge and/or experience to represent a library, and library staff. The representative is the voting member for the library and is eligible for advisory council membership. A system may adopt by-laws specifying member library representative term limits or attendance requirements.

§1.113. Advisory Council Election.

The representatives in an annual meeting shall elect members of their group to fill council vacancies. The term of office for representatives and alternates shall be the state fiscal year.

§1.114. Advisory Council Terms of Office.

The term of office of a council member is three years. A council member may serve no more than two consecutive terms, but shall again become eligible for election to the council after an absence of one full term. Council members may be replaced by a vote of the council if a council member does not regularly attend council meetings.

§1.115. Advisory Council Officers.

The council shall annually elect a chair, vice-chair, and secretary.

§1.116. Representation on the Council.

Broad geographical representation and representation by size and type of member library is encouraged on the system advisory council.

§1.117. Council Officers, Not Reappointed as Library Representative.

Representatives are elected to council each fiscal year. Thereafter, the representative shall complete his or her council term of three years unless the representative is replaced as the official representative of the member library. If the council member is replaced as the official representative, the new representative may vote on behalf of his or her library at the annual meeting of representatives to fill council vacancies. No individual library in the system shall have more than one representative on the system advisory council.

§1.118. Advisory Council Vacancies.

Vacancies on the system advisory council arising for reasons other than the regular expiration of terms of office may be filled by election or appointment from among the representatives for the unexpired term. If the unexpired term was held by an officer of the council, the representative may be elected or appointed to fill the unexpired term and need not necessarily be that officer. The vacated council office may be filled from among the members already on that council.

§1.119. Federated County and Multi-county Representation.

A federated county or multi-county library system will be eligible to send to the annual meeting of representatives either one representative to represent the entire federated county or multi-county library system; or the federated county or multi-county library system may elect to permit each individual member in that system to send one representative to the meeting. Only those federated county or multi-county system member libraries that could individually qualify for state library system membership may be eligible to send a representative.

§1.120. Council Review and Approval Process.

Unless otherwise provided for in the system bylaws, the signature of the council chairman on the following documents shall be required as certification that the advisory council has had an opportunity to review and approve: the system long range plan, the annual program of services and budget, amendments to the annual program or budget requiring a contract modification, and system bylaws. In the event that a member of the advisory council has had an opportunity to review the documents, but does not approve their contents, a letter stating minority reports should accompany the documents to the State Library. In the event that a majority of the advisory council does not approve the contents of one of the documents referred to in this section, the chairman should sign the certificate of review and forward the advisory council's report with it. The chairman of the advisory council should sign the certificate of review in the appropriate place, if the majority of the advisory council determine that they have not been adequately informed of its contents by the major resource center staff.

§1.121. Disqualification of Council Members.

If the library represented by a council member is disqualified from system membership or chooses to withdraw from the system, that council member shall cease to be a member of the system advisory council.

§1.123. Voting by Member Library Representatives.

The representative of each member library of a major resource system shall have one vote as a representative of a member library.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904734

Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 463-5459

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CHAPTER 8. TEXSHARE LIBRARY CONSORTIUM

13 TAC §§8.1 - 8.5

The Texas State Library and Archives Commission proposes to amend 13 TAC §§8.1 - 8.5 regarding the TexShare Library Consortium. The proposed revisions would establish criteria for admitting libraries into the TexShare consortium as members or as affiliated members and would provide guidelines regarding the organization and structure of the advisory board as specified in HB 3756, enacted by the 81st Legislature. The proposed criteria would ensure that the admittance of libraries as members or as affiliated members would enhance resource-sharing services to the consortium members.

Beverley Shirley, Library Resource Sharing Division Director, has determined that for each year of the first five years after the amended sections are in effect, state and local governments may experience cost savings in expenditures on electronic informational resources as a result of enforcing or administering the amended section, but that effect is indeterminable at this time. Ms. Shirley does not anticipate either a loss of, or an increase in, revenue to state or local government as a result of the proposed amended sections.

Ms. Shirley has also determined the public benefit of the proposed amended rules is that they will enable expansion of the TexShare consortium and its benefits to additional libraries. There will be no impact on small businesses, micro-businesses, or individuals as a result of enforcing the new section.

Written comments on the new rules may be submitted to Beverley Shirley, Library Resource Sharing Division, Texas State Library and Archives Commission, Box 12927, Austin, Texas 78711-2927; fax: (512) 936-2306.

The amendments are proposed under Government Code §441.225(b), which authorizes the commission to adopt rules to govern the operation of the consortium.

The amended sections affect Government Code, §§441.221 - 441.230.

§8.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Institution of higher education--An institution of higher education as defined by Education Code, §61.003, and a private or independent institution of higher education as defined by Education Code, §61.003.

(2) Annual Report Survey--A report submitted to the commission [~~Commission~~] each year on the member institution of higher education's participation in TexShare programs, the member library of clinical medicine's participation in TexShare programs, the member library of nonprofit library group's participation, or in fulfillment of a public library's system membership requirements.

(3) Commission--The Texas State Library and Archives Commission.

(4) Consortium--The TexShare Library Consortium.

(5) Director and Librarian--Chief executive and administrative officer of the commission.

(6) Public Library has the meaning assigned by Government Code, §441.122.

(7) Library of clinical medicine has the meaning assigned to Non-Profit Corporation by Government Code, §441.221.

(A) Extensive library services are defined as those services set forth in §1.81(4)(C) and (D) of this title (relating to Quantitative Standards for Accreditation of Library).

(B) Extensive collections in the fields of clinical medicine and the history of Medicine--a minimum of 10,000 library resources in print and in electronic format, comprised of books, journal titles, technical reports, and databases on clinical medicine and the history of medicine.

(8) Public school--any school accredited by under Education Code Subchapter D Accreditation Status (§§39.071 - 39.076).

(9) Public school library--an organized collection of printed, audiovisual and/or computer resources in a public school or public school campus (elementary or secondary). A public school library makes resources and services available to all students, teachers, and administrators. Collections such as classroom "libraries" or collections of primarily textbooks or other similar classroom teaching materials are not public school libraries.

(10) Certified school librarian--a public school staff member holding a current school librarian certificate issued by the State Board for Educator Certification under the authority of Education Code, Chapter 21, Subchapter B (§§21.031 - 21.058).

(11) Certified staff member--a public school staff member holding a current certificate, license, permit, or other credential issued by the State Board for Educator Certification under the authority of Education Code, Chapter 21, Subchapter B (§§21.031 - 21.058).

(12) Internet connection--A combination of hardware, software and telecommunications services that allows a computer to communicate with any other computer on the worldwide network of networks known as the Internet, and that adheres to Internet standards documents of the Internet Engineering Steering Group, Internet Architecture Board, and the Internet community.

(13) Consortium membership refers to membership held by those libraries meeting the eligibility criteria specified in §8.3(b)(2) or (3) of this chapter (relating to Consortium Membership and Affiliated Membership). Libraries meeting these requirements are referred to as "members" or "consortium members."

(14) Affiliated membership refers to membership held by those libraries meeting the eligibility criteria specified in §8.3(b)(1) of this chapter. Libraries admitted under this section are referred to as "affiliated members."

(15) Nonprofit library--A library not already qualified for consortium membership by virtue of being a public library, library of clinical medicine, or library affiliated with an institution of higher education that is:

(A) Established as a nonprofit corporation under the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes); or

(B) An administrative subdivision of a nonprofit corporation established under the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes); or

(C) Located in Texas and operated by a unit of local, state, or federal government; or

(D) Located in Texas and a designated tribal community library.

(16) Nonprofit library group--Two or more nonprofit libraries that share a set of common interests and have a defined membership structure.

§8.2. Purpose.

The purpose of TexShare is to assist libraries across the state [~~public libraries, libraries of clinical medicine, and libraries at institutions of higher education in Texas~~]:

(1) to improve the availability of library resources in all communities;

(2) to promote the future health and well-being of the citizenry and enhance quality teaching and research excellence at institutions of higher education through the efficient exchange of information and the sharing of library resources;

(3) to maximize the effectiveness of library expenditures by enabling libraries to share staff expertise and to share library resources in print and in an electronic form, including books, journals, technical reports, and databases;

(4) to increase the intellectual productivity of customers at the participating institutions by emphasizing access to information rather than ownership of documents and other information sources; and

(5) to facilitate joint purchasing agreements for purchasing information services and encourage cooperative research and development of information technologies. [~~Membership~~]

§8.3. Consortium Membership and Affiliated Membership [~~Membership~~].

(a) Nonprofit library group petitioning for membership or affiliated membership status:

(1) A nonprofit library group that meets the following criteria may petition the Director and Librarian for affiliated membership status. The Director and Librarian will review the petition to determine that all the following criteria are met. Based upon the findings of the review, the Director and Librarian will either grant or deny the petition.

(A) The nonprofit library group's affiliation with the consortium is funded by the nonprofit libraries comprising the group or by a sustainable funding source.

(B) The nonprofit library group's affiliation will enhance resource-sharing services to the consortium members.

(2) A nonprofit library group that meets the following criteria may petition the Director and Librarian for membership status in the consortia. The Director and Librarian will review the petition to determine that all the following criteria are met. Based upon the findings of the review, the Director and Librarian will either grant or deny the petition.

(A) The nonprofit library group has had affiliated membership status in the consortium for a minimum of two years.

(B) During its affiliation with TexShare, members of the nonprofit library group have participated in two or more TexShare programs.

(C) The nonprofit library group's membership in the consortium is supported through sustainable funding.

(D) The nonprofit library group's membership will enhance resource-sharing services to the consortium members.

(b) [~~(a)~~] Eligibility of individual institutions or libraries:[~~.~~]

(1) Affiliated membership is open to nonprofit libraries meeting the following requirements:

(A) The nonprofit library is a member of a nonprofit library group that has successfully petitioned the Director and Librarian for affiliated membership status.

(B) The nonprofit library certifies that it meets the minimum standards of accreditation established for the nonprofit library group in its petition for affiliated membership status.

(C) The nonprofit library certifies that it will abide by the funding requirements established for the nonprofit library group in its petition for affiliated membership status.

(2) Membership in the consortium is open to all institutions of higher education as determined by the Texas Higher Education Coordinating Board, and realized through the libraries that serve those institutions, to libraries of clinical medicine, and to all public libraries that are members of the state library system, as defined in Government Code, §441.127.

(3) Membership in the consortium is open to nonprofit libraries meeting the following requirements:

(A) The nonprofit library is a member of a nonprofit library group that has successfully petitioned the Director and Librarian for membership status.

(B) The nonprofit library provides certification that it meets the minimum standards of accreditation established for the nonprofit library group in its petition for membership status.

(c) [~~(b)~~] Agreement. Public libraries will be TexShare Members so long as they remain members of the state library system. Institutions of higher education, [~~and~~] libraries of clinical medicine, and nonprofit libraries must file a membership agreement, signed by a duly authorized administrative official, on joining the consortium. Affiliated member libraries must file an affiliated membership agreement specifying in which programs of the consortium they may participate and any limitations to participation that will apply. Participation in specific programs of the consortium may require additional agreements and fees.

(d) [~~(c)~~] Annual Report Survey. Libraries of member institutions of higher education, [~~and~~] member libraries of clinical medicine, and member and affiliated member libraries of nonprofit library groups shall file a current and complete annual report survey for the preceding year with the commission by January 15 of each year. Public libraries shall file their state library system reports as required by §1.85 of this title (relating to Annual Report).

(e) [~~(d)~~] Multiple Libraries. For institutions of higher education, the unit of membership in the TexShare Library Consortium shall be the institution. Institutions of higher education, as determined by the Texas Higher Education Coordinating Board, with libraries in multiple locations shall apply as a single unit. Community colleges shall apply per their certification by the Texas Higher Education Coordinating Board, in accordance with Government Code §61.063. Public libraries with branches shall apply as a single unit. For libraries of clinical medicine, the unit of membership shall be the non-profit corporation; those having multiple locations shall apply as a single unit. The various locations served by a non-profit corporation must be fully governed and owned by that non-profit corporation in order to qualify un-

der the non-profit corporation's membership. Non-profit corporations that amalgamate other, independently-administered organizations that are not fully governed and owned by that nonprofit corporation must submit a separate membership application for each independent organization regardless of any pooled or central funding. For nonprofit library groups, the unit of membership or affiliated membership shall be determined during the petitioning process.

(f) [~~(e)~~] Suspension of membership.

(1) Institutions of higher education, [~~and~~] libraries of clinical medicine, and nonprofit libraries: Membership or affiliated membership will be automatically renewed for each state fiscal year, provided that the library of clinical medicine, nonprofit library, or institution of higher education continues to meet the definition required in subsection (b) [~~(a)~~] of this section; and an annual report survey has been filed as required by subsection (d) [~~(c)~~] of this section.

(2) Public libraries: Public libraries shall remain TexShare members so long as they remain members of the state library system.

(3) Institutions of higher education, libraries of clinical medicine, nonprofit libraries, and public libraries that no longer meet the definition in subsection (b) [~~(a)~~] of this section, or are otherwise not qualified, will be suspended from membership or affiliated membership. They may re-join TexShare when they meet the definition in subsection (b) [~~(a)~~] of this section.

(g) [~~(f)~~] Members may receive services or be assessed fees based on demographic, financial, or other information, as reflected in the latest statistics from the National Center for Educational Statistics, the Texas Higher Education Coordinating Board, [~~and~~] the Independent Colleges and Universities of Texas, [~~or from~~] the most current statistical data reported to the commission in the Texas academic library survey, [~~and~~] the Texas public library annual report (filed as required by subsection (d) [~~(c)~~] of this section.), or from statistical information received directly from the member or affiliated member and certified by the member or affiliated member as accurate.

(h) [~~(g)~~] Fees. Some consortium services are supported by fees paid by participants. Fees will be set by the Director and Librarian for different categories of consortium services, in consideration of the costs involved in providing these services to member libraries.

(i) Complaints regarding fee assessments, denial of membership, or denial of affiliated membership will be processed in accordance with procedures outlined in §2.55 of this title (relating to Protest Procedure).

§8.4. Advisory Board.

(a) The commission shall appoint an [~~eleven-member~~] advisory board to advise the commission on matters relating to the consortium. At least two members must be representatives of the general public. Composition of the board will be representative of the various types of libraries comprising the membership.[~~, at least two members must be affiliated with a four-year public university in the consortium, at least two members must be affiliated with a public community college in the consortium, at least two members must be affiliated with a private institution of higher education in the consortium and at least two members must be affiliated with a public library in the consortium. The eleventh member is at large without any affiliation specified.~~] Members of the advisory board must be qualified by training and experience to advise the commission on policy.

(b) Members of the advisory board shall be chosen to present as much variety as possible in geographic distribution and size and type of institution.

(c) The advisory board shall meet at least twice a year regarding consortium programs and plans at the call of the advisory board's chairman or of the Director [~~director~~] and Librarian [~~librarian~~].

(d) Members of the advisory board serve three-year terms beginning September 1.

(e) A member of the advisory board serves without compensation but is entitled to reimbursement for actual and necessary expenses incurred in the performance of official duties, subject to any applicable limitation on reimbursement provided by the General Appropriations Act.

(f) The advisory board shall elect a chairman and a vice chairman at the first meeting of each fiscal year.

(g) The advisory board may recommend to the Director and Librarian and/or to the commission that:

(1) the consortium enter into cooperative projects with entities other than public libraries, libraries of clinical medicine, or institutions of higher education; and/or[~~.~~]

(2) the consortium admit or deny membership status or affiliated membership status to nonprofit library groups.

§8.5. Programs.

(a) The programs of the consortium shall include activities designed to facilitate library resource sharing. Such activities may include:

(1) providing electronic networks, shared databases, reciprocal borrowing, delivery services, and other infrastructure necessary to enable the libraries in the consortium to share resources;

(2) negotiating and executing statewide contracts for information products and services;

(3) coordinating library planning, research and development; or

(4) training library personnel.

(b) Programs of the consortium are established and administered for the benefit of consortium members. Consortium members may sometimes enter into formal or informal agreements with non-member entities. Under these agreements, consortium members may not provide systematic access to consortium services to non-member entities. This provision should not be construed in such a way as to limit a member institution's ability to provide on-site access to TexShare databases to members of the public.

(c) Public school libraries may participate in group purchasing agreements provided by the consortium if such libraries are managed by or report to a certified school librarian or other certified staff member in the public school or public school campus.

(d) Affiliated members may participate in programs of the consortium as specified in their affiliated membership agreement.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904735

Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 463-5459

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 88. POLYGRAPH EXAMINERS

16 TAC §§88.1, 88.10, 88.20 - 88.24, 88.26 - 88.29, 88.40, 88.70 - 88.80, 88.90, 88.91, 88.100

The Texas Department of Licensing and Regulation ("Department") proposes new rules at 16 Texas Administrative Code ("TAC"), Chapter 88, §§88.1, 88.10, 88.20 - 88.24, 88.26 - 88.29, 88.40, 88.70 - 88.80, 88.90, 88.91 and 88.100 regarding the licensing and examination of polygraph examiners.

These rules are necessary to implement Senate Bill 1005 ("SB 1005"), 81st Legislature, Regular Session, 2009, which transferred the regulation of polygraph examiners from the Polygraph Examiners Board to the Texas Department of Licensing and Regulation effective May 13, 2009, and which amended Texas Occupations Code, Chapter 1703 relating to the regulation of polygraph examiners. These proposed rules are filed simultaneously with the proposed repeal of the Polygraph Examiners Board rules in order to reorganize and clarify the rules regulating polygraph examiners under Title 16, Texas Administrative Code, relating to the rules of the Texas Department of Licensing and Regulation.

The Polygraph Examiners Advisory Committee ("the Committee") approved the proposed rules at its meeting on October 13, 2009. The proposed rules have been drafted from the Polygraph Examiners Board rules with some modifications. In all sections where a rule previously referred to the "Polygraph Examiners Board" or "Board", reference is now made to the "Department". Because the Board was abolished by the enactment of SB1005, organizational provisions of the Board have been deleted along with general rules of practice and procedure which are now covered by the Department's general provisions relating to licensing under Texas Occupations Code, Chapter 51.

Former rules that lacked statutory authority have also been deleted. Because Texas Occupations Code, Chapter 1703 does not authorize an intern license for a preceptor trainee or allow for modification of an internship license for current or former governmental polygraph examiners, those provisions are not included in the proposed rules. In addition, an applicant for a polygraph examiner internship license is no longer required to obtain a surety bond or insurance policy because of the lack of statutory authority to require coverage.

Proposed §88.10 which sets out the definition of "active investigative experience" has been expanded to include a person engaged in the business of conducting investigations. The definition of "investigation" has been added pursuant to Texas Occupations Code, §1703.203 which requires that the Department establish criteria for evaluating active investigative experience. The Committee recommended the expansion of the definition of "polygraph examination" to include the term "detecting recognition" along with the additional definition of "Polygraph Testing Format".

Section 88.1 prescribes the Department's authority to propose rules pursuant to Texas Occupations Code, Chapters 51 and 1703.

Section 88.10 defines key terms relating to the regulation of polygraph examiners.

Section 88.20 establishes license application requirements for individuals under Texas Occupations Code Chapter 1703 for a polygraph examiner license.

Section 88.21 establishes requirements for renewing a polygraph examiner license under Chapter 88.

Section 88.22 sets forth the requirement that non-resident applicants file an irrevocable consent with the department under Texas Occupations Code Chapter 1703.

Section 88.23 sets forth the requirements for registration with the county clerk.

Section 88.24 establishes the requirements for issuance of a license for out of state license holders.

Section 88.26 establishes license application requirements for individuals under Texas Occupations Code Chapter 1703 for a polygraph examiner internship license.

Section 88.27 lists the terms of a polygraph examiner internship license issued under Chapter 88.

Section 88.28 sets forth the responsibilities of registered curriculum providers.

Section 88.29 establishes examination requirements for polygraph examiner license issued under Texas Occupations Code Chapter 1703.

Section 88.40 sets forth the financial security requirements for a polygraph examiner license issued under Texas Occupations Code Chapter 1703.

Section 88.70 sets forth the responsibilities of license holders who serve as sponsors for trainees.

Section 88.71 sets forth the responsibilities of polygraph examiner internship license holders.

Section 88.72 establishes the requirements for change of name and/or change of address under Texas Occupations Code Chapter 1703.

Section 88.73 establishes the requirements for licensee display of license under Texas Occupations Code Chapter 1703.

Section 88.74 sets forth the responsibilities of licensees when conducting polygraph examinations.

Section 88.75 sets forth actions licensees are prohibited from engaging in when conducting polygraph examinations.

Section 88.76 sets forth the responsibilities of licensees when giving polygraph examination results.

Section 88.77 sets forth the responsibilities of licensees in maintaining confidentiality of examination results under Texas Occupations Code Chapter 1703.

Section 88.78 sets forth the responsibilities of licensees when using contracts for services and waivers of liability under Texas Occupations Code Chapter 1703.

Section 88.79 sets forth the record keeping responsibilities of licensees.

Section 88.80 establishes license and other fees under this chapter and Texas Occupations Code Chapter 1703.

Section 88.90 sets forth the criteria for the imposition of administrative penalties and sanctions.

Section 88.91 prescribes the Department's authority to enforce rules pursuant to Texas Occupations Code, Chapters 51, 88, and 1703.

Section 88.100 establishes polygraph examiner internship curriculum requirements.

William H. Kuntz, Jr., Executive Director has determined that for the first five-year period the new rules are in effect there will be no cost to state or local government as a result of enforcing or administering the new rules.

Mr. Kuntz also has determined that for each year of the first-year period the new rules are in effect, the public benefit anticipated as a result of the proposed rules will be that the Department's rules relating to polygraph examiners will be more easily understood by licensees who are required to comply with the rules and that the rules will promote the Department's operational efficiency in administering Texas Occupations Code, Chapter 1703. There will be no adverse economic effect on small or micro-business and to persons who are required to comply with the proposal.

Since the agency has determined that the rule will have no adverse economic effect on small business preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002 are not required.

Comments on the proposal may be submitted to Caroline Jackson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The new rules are proposed under Texas Occupations Code, Chapters 51 and 1703, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 1703. No other statutes, articles, or codes are affected by the proposal.

§88.1. Authority.

This chapter is promulgated under the authority of Texas Occupations Code, Chapters 51 and 1703.

§88.10. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly shows otherwise.

(1) Active investigative experience--Documentation that the applicant has been engaged in the business of conducting investigations during the five years preceding the application; or documentation that the applicant has obtained the minimum training hours necessary to obtain a basic law enforcement certificate issued by the Texas Commission on Law Enforcement Officer's Standards and has utilized the training during the five years preceding the application.

(2) Applicant--The person submitting an application for a license issued by the department under this chapter.

(3) Commission--The Texas Commission of Licensing and Regulation.

(4) Committee--The Polygraph Advisory Committee.

(5) Department--The Texas Department of Licensing and Regulation.

(6) Executive director--The executive director of the department.

(7) Instrument--A device used to test a subject to detect deception or verify the truth of a statement by recording visually, permanently, and simultaneously a subject's cardiovascular and respiratory patterns. The term includes a lie detector, polygraph, deceptograph, or any other similar or related device.

(8) Investigation--Obtaining or furnishing information related to the identity, business, occupation, movement, location, acts, associations, reputation or character of a person; or to the location or recovery of lost or stolen property or the cause or responsibility for a fire, libel, loss, accident, damage, or injury to a person or property; or securing evidence to be used before a court, board, officer, or investigative committee.

(9) License holder or licensee--The person to whom the department issued a license.

(10) Polygraph examination--The use of any instrument to graphically record simultaneously the physiological changes in human respiration, cardiovascular activity, and any other physiological changes that can be recorded for the purpose of verifying truth or detecting recognition or deception and includes the reading and interpretation of the polygraph records and results. A polygraph examination may contain four phases known as the Pre-test phase, Testing phase, Chart analysis phase and Post-test phase, any one of which constitutes a polygraph examination.

(11) Polygraph examiner--A person licensed under this chapter to use an instrument to detect deception or verify the truth of a statement.

(12) Polygraph examiner internship--A course of study of polygraph examinations and of the administration of polygraph examinations by a trainee under the personal supervision and control of a polygraph examiner as prescribed by the department.

(13) Polygraph Testing Format--An approved question format approved and accepted as a valid testing technique by the Defense Academy for Credibility Assessment (DACA).

(14) Sponsor--A person licensed under this chapter for not less than two years as a polygraph examiner who provides instruction and supervision to a trainee.

(15) Trainee--A person who holds a polygraph examiner internship license under this chapter.

§88.20. Licensing Requirements--Polygraph Examiner.

To be eligible for a polygraph examiner license, an applicant must:

(1) Submit a completed application on a department-approved form;

(2) Pay the fee required under §88.80;

(3) Provide a copy of an insurance policy, surety bond or bond continuation certificate required under §88.40;

(4) Either:

(A) Hold a baccalaureate degree from a college or university; or

(B) Have active investigative experience during the five years preceding the application;

(5) Either:

(A) Graduate from a department-approved polygraph school and satisfactorily complete a six month polygraph examiner internship, or

(B) Satisfactorily complete a 12 month polygraph examiner internship;

(6) Pass a written and practical examination required under §88.29; and

(7) Successfully pass a criminal background check.

§88.21. Licensing Requirements--Polygraph Examiner Renewal.

(a) A polygraph examiner license is valid for one year from the date of issuance and may be renewed annually.

(b) To renew a license, an applicant must:

(1) Submit a completed application on a department-approved form;

(2) Pay the applicable fee required under §88.80;

(3) Provide proof of an insurance policy, surety bond or bond continuation certificate required under §88.40; and

(4) Successfully pass a criminal background check.

(c) Non-receipt of a license renewal notice from the department does not exempt a person from any requirements of this chapter.

§88.22. Licensing Requirements--Polygraph Examiner Non-resident Applicants.

An applicant for the issuance or renewal of a polygraph examiner license who is not a resident of this state must file with the department an irrevocable consent required under Texas Occupations Code §1703.206.

§88.23. Licensing Requirements--Registration with County Clerk.

(a) A polygraph examiner must register with the county clerk of the county in which the examiner maintains a business address.

(b) A polygraph examiner who holds a Texas license but has no Texas address must register with the County Clerk of Travis County, Texas.

§88.24. Licensing Requirements--Polygraph Examiner Applicant with Out-of-State License.

(a) The holder of an out-of-state polygraph examiner license must meet the following requirements:

(1) Submit a completed application on a department-approved form;

(2) Provide information sufficient for the department to verify that the applicant has, for at least one year, held an active and valid license in another jurisdiction and that the applicant's licensure is in good standing;

(3) Provide information sufficient for the department to verify that the applicant has not been convicted of an offense that directly relates to the duties and responsibilities of a polygraph examiner;

(4) Provide information sufficient for the department to verify that the applicant has administered 30 polygraph examinations before applying for a Texas license;

(5) Provide a copy of an insurance policy, surety bond or bond continuation certificate required under §88.40;

(6) Furnish a copy of the applicant's valid license; and

(7) Pay the applicable license application fee required under §88.80.

(b) A person who is applying from a jurisdiction where the examination standards are not substantially equivalent to those in Texas must pass the written and practical examination required under §88.29.

(c) A person who is applying from a jurisdiction whose examination standards have been determined by the department to be substantially equivalent to those in Texas may waive the written and practical examination required under §88.29.

§88.26. Licensing Requirements--Polygraph Examiner Internship License.

To be eligible for a polygraph examiner internship license, an applicant must:

(1) Submit a completed application on a department-approved form;

(2) Pay the fee required under §88.80; and

(3) Successfully pass a criminal background check.

§88.27. Polygraph Examiner Internship License Term.

(a) A polygraph examiner internship license expires on the first anniversary of the date of issuance and may be renewed once.

(b) A trainee may not hold another internship license until the first anniversary of the date the previous internship license expired.

§88.28. Responsibilities of Registered Curriculum Providers.

(a) To be eligible to provide a polygraph examiner education course, a registrant must:

(1) submit a completed application on a department-approved form; and

(2) file and obtain approval of the course curriculum required under §88.100.

(b) A registration under this chapter is valid for one year and may be renewed annually.

§88.29. State Examination for Polygraph Examiner License.

(a) To be eligible to sit for an examination, an applicant must:

(1) submit a completed license application on a department-approved form;

(2) pay the applicable license application fee required under §88.80;

(3) satisfy the requirements to obtain a polygraph examiner license required under §88.20(4) and (5); and

(4) have completed 30 polygraph examinations.

(b) The polygraph examiner state examination consists of a written, scenario, and practical portion.

(c) A score of seventy is required to pass each portion of the examination.

(d) The practical examination consists of five polygraph examinations selected by the applicant and conducted within 24 months prior to the filing of the application for licensure. The examinations will be evaluated and graded by three subject matter experts and the average of these grades will be the score awarded to the applicant for the practical examination.

(e) Mock polygraph examinations do not qualify as polygraph examinations for purposes of satisfying the practical examination requirements.

§88.40. Financial Security.

(a) Before a license is issued and upon each renewal, a polygraph examiner applicant must provide proof to the department that the applicant has obtained a $5,000 insurance policy or surety bond guaranteeing payment of up to $5,000 arising out of judgments recovered against the applicant for any wrongful or illegal act committed by the applicant in the course of administering a polygraph examination.

(b) A polygraph examiner applicant must maintain an insurance policy, surety bond or continuation bond at all times during the license period.

(c) The insurance policy or bond must be issued by a company authorized to do business in the State of Texas.

(d) The insurance policy or bond must remain in effect for two years after the effective cancellation date.

§88.70. General Responsibilities--Sponsor.

(a) To serve as a sponsor for a trainee, a Texas licensed polygraph examiner must have held a Texas Polygraph Examiner license continuously for at least two years immediately preceding submission of the sponsor application.

(b) No licensed polygraph examiner may sponsor more than two trainees at any one time.

(c) The sponsor must be present to directly observe a total of eight polygraph examinations conducted by the trainee during the course of the polygraph examiner internship.

(1) The sponsor must directly observe the first five polygraph examinations and must directly observe a minimum of three additional polygraph examinations during the remainder of the polygraph examiner internship.

(2) When polygraph examinations are conducted outside the direct observation of the sponsor, the sponsor must be available either by phone, text messaging, email or other real time communication method to assist the trainee.

(d) The sponsor is responsible for all chart interpretations of polygraph examinations conducted by a polygraph examiner internship trainee and must carefully review each polygraph examination administered by the trainee for accurate chart interpretation before giving a final opinion.

(e) At the conclusion of each week a sponsor must review the report submitted by the trainee describing all polygraph related work conducted during the week.

(f) The sponsor must prepare and keep a monthly report of all polygraph related work conducted by the trainee and all curriculum used in the course of supervised instruction. The report must contain the following information:

(1) For examinations directly observed by the sponsor:

(A) the examination date;

(B) the examinee's name;

(C) the employer's name;

(D) the technique and type of instrument used;

(E) the type of test; and

(F) the result of test.

(2) For examinations conducted outside the direct observation of the sponsor, the report must include paragraph (1)(A) - (E) above and:

(A) the trainee's preliminary opinion of examination results;

(B) the date the sponsor reviewed the trainee's preliminary opinion;

(C) whether the sponsor's opinion confirmed or contradicted the trainee's preliminary opinion;

(D) documentation of any real time communication method used by the trainee to confer with the sponsor during the course of the examination; and

(E) a description of the assistance provided by the sponsor.

(3) For curriculum:

(A) the number of hours of supervised instruction provided to trainee, and

(B) the type of curriculum used in the course of supervised instruction.

(g) The sponsor must use in the course of supervised instruction the curriculum approved and adopted under §88.100.

(h) At the completion of the polygraph examiner internship, the sponsor must, within ten days, submit notice of the completion of internship to the department on a department-approved form or in a manner set by the department.

(i) A sponsor who terminates the sponsorship of a trainee must, within 10 days:

(1) notify the trainee in writing;

(2) submit notice of the termination to the department on a department-approved form or in a manner set by the department; and

(3) submit a copy of all monthly reports required under subsection (f) to both the department and the trainee.

(j) The sponsor must retain all polygraph examiner internship records for at least two years and upon request, must make available to the department all records required by the law and this chapter to determine compliance with the program.

§88.71. General Responsibilities--Polygraph Examiner Internship.

(a) A trainee must observe the sponsor conduct a minimum of two polygraph examinations prior to beginning field work in the polygraph examiner internship program.

(b) At the conclusion of each week, a trainee must provide the sponsor with a report describing all polygraph related work conducted during the week.

(c) A preliminary opinion of the results of a polygraph examination must, if requested, be given by the trainee for examinations that are administered outside the direct observation of the sponsor. The trainee must advise the examinee that the opinion is preliminary until the examination is reviewed and an opinion is given by the sponsor.

(d) A trainee who terminates the polygraph examiner internship with a sponsor must, within 10 days:

(1) notify the former sponsor in writing; and

(2) submit notice of the termination to the department on a department-approved form or in a manner set by the department.

(e) A trainee who changes sponsors must, within 10 days:

(1) notify the former sponsor in writing;

(2) submit notice of the change of sponsor to the department on a department-approved form or in a manner set by the department; and

(3) pay the fee required under §88.80.

§88.72. Responsibility of Licensee--Change of Name and/or Address.

A licensee must notify the department in writing of a name change, change in principal business address or change in mailing address not later than the 30th day after the date the change is made.

§88.73. Responsibility of Licensee--Display of License.

A licensee must prominently display their license at their place of business or place of internship and must display their license when conducting remote polygraph examinations.

§88.74. Responsibility of Licensee--Conducting Polygraph Examinations.

When conducting a polygraph examination, a licensee must:

(1) Mark questions and answers. All questions asked a subject during a polygraph examination and all of the subject's answers must be marked on each polygraph chart.

(A) These markings must be done by making a stimulus mark at the exact point on each polygraph chart where questions began, ended, and the subject's answer was given.

(B) Each polygraph examination given must have a written question sheet which contains the exact wording of every question asked.

(C) The use of abbreviations is prohibited, unless they are defined on the question sheet.

(D) Questions on question sheets may be identified by numbers, letters, or any number-letter combination.

(E) Each question asked on every polygraph chart must be noted by marking the letter, number, or number-letter combination near the stimulus marks so that the relationship of the question asked on the chart and the question sheet may be easily identified.

(2) Ask questions two separate times. The licensee must not give a verbal or written opinion, based on chart analysis, until the same relevant questions have been asked a minimum of two (2) separate times.

(3) Observe response intervals. The licensee must allow a minimum of twenty (20) seconds between each question to give the examinee enough time to physiologically respond to each verbal stimulus.

(A) The twenty (20) second period is measured from the beginning of one question until the beginning of the next question, or the ending of the examination.

(B) The requirement does not apply to chart markings such as the announcement of the start of the examination nor does it apply to any comment made by the examiner during the examination that does not require an answer from the examinee such as answering instructions or movement instructions by the examiner.

§88.75. Responsibility of Licensee--Prohibited Acts.

(a) A licensee must not conduct an examination when the licensee has reason to believe the examination is intended to circumvent or defy the law.

(b) A licensee must not include in the testing phase, questions that are intended to inquire into or develop information about an examinee's religious, racial or political beliefs except when it is relevant to a specific investigation.

(c) A licensee must not interrogate or conduct an examination on the subject's sexual behavior, unless the topic is a specific issue or is relevant to the examination or is necessary for the development of comparison questions.

(d) A licensee must not conduct a polygraph examination on a subject whom the licensee believes, through observation or any other credible evidence, to be physically or psychologically unfit for an examination.

§88.76. Responsibility of Licensee--Polygraph Examination Results.

(a) The polygraph examiner must, if requested, advise the examinee of the results of the examination prior to the termination of the polygraph examination. The results will be given to the examinee as it relates to the specific polygraph testing format:

(1) deception indicated or recognition indicated;

(2) no deception indicated or no recognition indicated;

(3) inconclusive; or

(4) no opinion.

(b) The examinee must be given an opportunity to explain the results of the examination to the polygraph examiner.

§88.77. Responsibility of Licensee--Confidentiality of Examination Results.

(a) A polygraph examiner, trainee or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The department or any other governmental agency that acquires information from a polygraph examination under this section must maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from polygraph examination is disclosed under subsection (a)(4) may not disclose the information except as provided by this section.

§88.78. Responsibility of Licensee--Contract for Services and Waiver of Liability.

(a) A written contract for a polygraph examiner's services must include the following information: "To file a complaint against a polygraph examiner, contact the Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202, (512) 463-6599, www.license.state.tx.us or cs.polygraph@license.state.tx.us."

(b) A waiver of liability signed by the subject of a polygraph examination must include the following information: "To file a complaint against a polygraph examiner, contact the Texas Department

of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202, (512) 463-6599, www.license.state.tx.us or cs.polygraph@license.state.tx.us."

§88.79. Responsibility of Licensee--Record Keeping.

(a) All polygraph charts, question sheets, written reports, data sheets, films, audio and video tapes, opinions of the examiner from chart analysis, electronic records of examinations and other relevant documents must be retained for inspection by the department for at least two (2) years from the date of the examination.

(b) The licensee, upon request, must make available to the department all records and other relevant documents required by the law and this chapter.

§88.80. Fees.

(a) Application Fees

(1) Polygraph Examiner

(A) Original application--$500

(B) Renewal--$450

(C) Duplicate--$15

(D) Out-of-State--$500

(2) Internship

(A) Original application--$150

(B) Renewal--$75

(C) Duplicate--$15

(D) Change of Sponsor--$25

(b) Late renewal fees for licenses issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(c) All fees are nonrefundable except as provided for by commission rules or statute.

§88.90. Sanctions and Administrative Penalties.

A person who violates Texas Occupations Code, Chapter 1703, a rule, or an order of the executive director or commission relating to Texas Occupations Code, Chapter 1703, will be subject to administrative sanctions and/or administrative penalties under Texas Occupations Code, Chapters 51 and 1703 and applicable agency rules.

§88.91. Enforcement Authority.

The enforcement authority granted under Texas Occupations Code, Chapters 51 and 1703 and any associated rules may be used to enforce Texas Occupations Code, Chapter 1703 and this chapter.

§88.100. Technical Requirements--Polygraph Examiner Internship Curriculum.

(a) To satisfactorily complete a polygraph examiner internship, a trainee must:

(1) graduate from a department-approved polygraph school and complete a six month polygraph examiner internship; or

(2) complete a 12 month polygraph examiner internship.

(b) The following internship schedule has been approved and adopted by the Commission as the minimum type, and number of hours, of any internship training program used in the course of supervised instruction:

(1) History and development of polygraph--four hours.

(2) Legal and ethical aspects of polygraph--20 hours.

(A) Texas Polygraph Examiners Act.

(B) Statements and reports, civil rights, examiner and professional ethics hours

(3) Physiology--24 hours.

(A) Nervous system, autonomic nervous system.

(i) Sympathetic system.

(ii) Parasympathetic system.

(B) Circulatory system and the heart.

(C) Respiratory system.

(D) Effects of drugs, alcohol, and illness.

(4) Psychology--24 hours.

(A) General.

(B) Abnormal.

(C) As applied to polygraph.

(5) Interrogation and interviews--100 hours.

(A) Receiving case briefing.

(B) Pre-test interview.

(C) Post-test interview.

(6) Chart interpretation--120 hours.

(A) All types of tests and responses.

(B) Chart marking.

(C) Test results: No Deception Indicated, Deception Indicated, Inconclusive or No Opinion.

(7) Question formulation and test construction--120 hours.

(A) All types of tests.

(B) All types of questions.

(C) Semantics.

(8) Instrumentation--10 hours.

(A) Construction and maintenance.

(B) Trouble shooting.

(C) Nomenclature.

(9) Summary and general review--10 hours.

(10) Supervised testing and interviewing--minimum of 30 tests conducted in Texas.

(11) Counseling and critique as required in opinion of sponsor.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904750
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 463-7348

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PART 8. TEXAS RACING COMMISSION

CHAPTER 311. OTHER LICENSES
SUBCHAPTER B. SPECIFIC LICENSES

16 TAC §311.104

The Texas Racing Commission proposes amendments to 16 TAC §311.104, Trainers. Section 311.104 relates to the licensing requirements of trainers.

The changes to §311.104 require trainer candidates to submit two character references and interview with the board of stewards or judges. The changes also require an additional $50 examination fee after candidates have failed a portion of the exam on their first two attempts, and places limits on how quickly a candidate may retake the exam after failing more than once.

Charla Ann King, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Ms. King has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be that the licensing requirements for trainers will more closely align with national model rules. The fee changes will also encourage trainer candidates to adequately prepare before scheduling their examinations.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §7.02, which requires the Commission to adopt categories of licenses for the various occupations and to specify by rule the qualifications and experience required for licensing in each category.

The amendment implements Texas Revised Civil Statutes Annotated Article 179e.

§311.104. Trainers.

(a) Licensing.

(1) Except as otherwise provided by this subsection, a trainer must obtain a trainer's license before the trainer may enter a horse or greyhound in a race. A trainer may enter a horse or greyhound in a stakes race without first obtaining a license, but must obtain a license before the horse or greyhound may start in the stakes race. Except as otherwise provided by this section, to be licensed by the Commission as a trainer, a person must:

(A) be at least 18 years old;

(B) submit a minimum of two written statements from licensed trainers, veterinarians, owners, or kennel owners, attesting to the applicant's character and qualifications;

(C) interview with the board of stewards or judges;

(D) [~~(B)~~] satisfactorily complete a written examination prescribed by the Commission; and

(E) [~~(C)~~] satisfactorily complete a practical examination prescribed by the Commission and administered by the stewards or racing judges or designee of the stewards or racing judges.

(2) Examinations. [~~The standard for passing the written examination must be printed on the examination.~~]

(A) A $50 non-refundable testing fee is assessed for administering the written and practical examinations. The fee is due and payable at the time the written [~~first~~] examination [~~appointment~~] is scheduled. If the applicant fails the written or practical examination, the applicant will be allowed to retake it once without an additional fee. The applicant must pay a $50.00 non-refundable testing fee to schedule an examination after each retest. A minimum of 48 hours advance notice is required to reschedule an examination appointment without loss of the testing fee. An applicant who fails to timely reschedule an examination appointment must pay a new testing fee to reschedule the appointment. A steward or judge may waive the additional fee if, in the opinion of the steward or judge, the applicant shows good cause for the failure to timely reschedule an examination appointment.

(B) The standard for passing the written examination must be printed on the examination. An applicant who fails the written examination may not take [~~reschedule~~] the written examination again before the 90th [~~60th~~] day after the applicant failed the written examination. An applicant who fails the written examination for a second or any subsequent time may not reschedule the written examination for 180 calendar days after the last failure and the applicant must pay an additional $50 non-refundable testing fee. After successful completion of the written exam an applicant has 365 calendar days to successfully complete the practical exam.

(C) An applicant who fails the practical examination may not reschedule the practical examination again before the 180th day after the applicant failed the practical examination. An applicant who fails the practical examination for a second time may not reschedule another practical examination for 365 calendar days after the day the applicant failed the second practical examination and the applicant must pay an additional $50 non-refundable testing fee.

(D) The Commission may waive the requirement of a written and/or practical examination for a person who has a current license issued by another pari-mutuel racing jurisdiction. If a person for whom the examination requirement was waived demonstrates an inability to adequately perform the duties of a trainer, through excessive injuries, rulings, or other behavior, the stewards or racing judges may require the person to take the written and/or practical examination. If such a person fails the examination, the stewards or racing judges shall suspend the person's license for 90 [~~60~~] days with reinstatement contingent upon passing the written and/or practical examination.

(3) - (4) (No change.)

(b) - (k) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904686
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 833-6699

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CHAPTER 313. OFFICIALS AND RULES OF HORSE RACING

The Texas Racing Commission proposes amendments to 16 TAC §§313.41, 313.101, 313.106, 313.301, 313.406, 313.441, 313.505, and 313.507. The amendments are proposed in conjunction with the Commission's rule review of Chapter 313 pursuant to Texas Government Code §2001.039. Notice of this rule review was published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10335).

The sections proposed for amendment relate to: the duties of a horse racing association's racing secretary; the entry procedures for horses; the closing of entries for split races; eligibility to make a claim for a horse in a claiming race; the saddle cloths and head numbers that horses must wear in a race; the safety and fairness of the start in a horse race; official workouts of horses at a licensed training facility; and training facility occupational licenses.

Charla Ann King, Executive Director, has determined that for the first five year period the proposal is in effect there will be no fiscal implications for state or local government as a result of enforcing the proposals.

Ms. King has also determined that the proposal will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposal.

Ms. King has also determined that for each year of the first five years the proposal is in effect the following statements regarding the anticipated public benefit will apply:

The change to §313.41 aligns the state's rules with national model rules in regard to the duties of a racing secretary. The proposal would provide additional flexibility to a racetrack's racing secretary so that the secretary would have until the end of each day, rather than until only 10:30 a.m., to assign a weight to each horse in a handicap race on the day set for publication of the assigned weights.

The change to §313.101 aligns the state's rules with national model rules in regard to the race entry procedure for a horse. The proposal streamlines the entry process by: 1) eliminating the requirement that an entry made by phone or fax must be confirmed in writing no later than three hours before the post time for the first race on the day the entry is to run; and 2) adding new language that would require an entry made by phone or fax to be confirmed in writing only upon the request of the stewards or racing secretary. The proposal clarifies that an entry may be made in writing, by phone or by fax.

The change to §313.106 requires the racing secretary to provide notice of not less than 15 minutes before closing when an overnight race is split into two or more separate races. This change will provide an additional opportunity for making entries into the split races. The proposal also provides that when an overnight race is split, it forms two separate races.

The change to §313.301 requires that any claim made by a minor must also be co-signed by a commission-licensed adult parent or guardian, and the parent or guardian is liable for the claim. This change will help ensure that claims are binding.

The changes to §313.406 would align the state's rules with national model rules in regard to head numbers worn by horses in a race. Currently, any horse starting in a race must carry a conspicuous saddle cloth number, as well as a head number, that corresponds to its number in the official program. The proposal changes the requirement for the head number by clarifying that Quarter Horses, Paint Horses, and Appaloosas must wear head numbers, but that Thoroughbreds and Arabians are not required to do so. The changes also increase safety by requiring jockeys to wear safety helmets that have been approved by the American Society for Testing and Materials.

The changes to §313.441 align the state's rules with national model rules in regard to the safety and fairness requirements governing the start of a horse race. The proposal clarifies the circumstances occurring at a starting gate that would constitute an unfair start and clarifies the conditions under which stewards can declare a horse to be a non-starter, exclude individual horses from all pari-mutuel pools, or declare a "no contest."

The changes to §313.505 define the types of licensees that may ride a horse in an official workout to be a licensed jockey, apprentice jockey, exercise rider, or the trainer or assistant trainer of the horse. The changes also clarify that the timer may not also serve as the starter for a workout.

The changes to §313.507 specify that general managers and chief executive officers of a licensed training facility must obtain a training facility general manager license and not a training facility employee license. The changes also specify the rule number that establishes the fee for a general manager's license.

All comments or questions regarding the proposed amendments may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

SUBCHAPTER A. OFFICIALS
DIVISION 3. DUTIES OF OTHER OFFICIALS

16 TAC §313.41

The amendment is proposed under the Texas Revised Civil Statutes Annotated Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The amendment implements Texas Revised Civil Statutes Annotated Article 179e.

§313.41. Racing Secretary.

(a) - (b) (No change.)

(c) In handicap races, the racing secretary shall assign weight to each horse and shall post the weights in handicaps before the end of [~~10:30 a.m. on~~] the day set for publication of the assigned weights.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904687
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 833-6699

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SUBCHAPTER B. ENTRIES, SCRATCHES, AND ALLOWANCES
DIVISION 1. ENTRIES

16 TAC §313.101, §313.106

The amendments are proposed under the Texas Revised Civil Statutes Annotated Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The amendments implement Texas Revised Civil Statutes Annotated Article 179e.

§313.101. Entry Procedure.

(a) - (b) (No change.)

(c) An entry must be made in writing, [~~may be made~~] by telephone, or by facsimile to the racing secretary, but must be confirmed in writing should the stewards or racing secretary so request. [~~not later than three hours before post time for the first race on the day the entry is to run.~~]

(d) - (e) (No change.)

§313.106. Closing Entries.

(a) - (c) (No change.)

(d) If a race is canceled because of insufficient entries, the racing secretary may split any overnight race or write a substitute race in place of the canceled race. Where an overnight race is split, forming two or more separate races, the racing secretary shall give notice of not less than 15 minutes before such races are closed to grant time for making additional entries to such split races.

(e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904688
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 833-6699

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SUBCHAPTER C. CLAIMING RACES

16 TAC §313.301

The amendment is proposed under the Texas Revised Civil Statutes Annotated Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The amendment implements Texas Revised Civil Statutes Annotated Article 179e.

§313.301. Eligibility to Claim.

(a) - (b) (No change.)

(c) If the person making a claim is a minor, the claim must be co-signed by a licensed adult parent or guardian of the minor. A parent or guardian who co-signs a claim is liable for the claim. A claim made by a minor that is not co-signed in accordance with this subsection is invalid.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mark Fenner
General Counsel
Texas Racing Commission
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For further information, please call: (512) 833-6699

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SUBCHAPTER D. RUNNING OF THE RACE
DIVISION 1. JOCKEYS

16 TAC §313.406

The amendment is proposed under the Texas Revised Civil Statutes Annotated Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The amendment implements Texas Revised Civil Statutes Annotated Article 179e.

§313.406. Colors and Number.

(a) A horse starting in a race must carry a conspicuous saddle cloth number[~~, and shall carry a head number,~~] corresponding to its number in the official program. Quarter Horses, Paints, and Appaloosas shall, and Thoroughbreds and Arabians may, wear head numbers that correspond to their numbers in the official program.

(b) The jockey for a horse starting in a race shall be properly attired for riding in the race and wear:

(1) the racing colors provided by the owner of the horse the jockey is to ride, plus white riding pants, boots, and a number on the right shoulder corresponding to the mount's number as shown on the saddle cloth, head number if provided, and in the official [~~daily~~] program; and

(2) an A.S.T.M. approved safety helmet [~~a helmet of a type approved by the executive secretary~~] while mounted on any horse at a licensed racetrack.

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904691
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 833-6699

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DIVISION 3. THE RACE

16 TAC §313.441

The amendment is proposed under the Texas Revised Civil Statutes Annotated Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The amendment implements Texas Revised Civil Statutes Annotated Article 179e.

§313.441. The Start.

(a) The starter is responsible for assuring that each participant receives a fair start.

(b) [~~(a)~~] A horse is considered a starter for all purposes when the stall doors of the starting gate open in front of the horse at the time the starter dispatches the horses in a valid start.

[~~(b) The stewards shall declare a horse a non-starter if the stewards determine the horse was left at the post because the horse was not in the starting gate stall or the starting gate malfunctioned.~~]

(c) If, when the starter dispatches the field, any door at the front of the starting gate stalls should not open properly due to a mechanical failure or malfunction or should any action by any starting personnel directly cause a horse to receive an unfair start, the stewards may declare such a horse a non-starter.

(d) Should a horse, not scratched prior to the start, not be in the starting gate stall thereby causing it to be left when the field is dispatched by the starter, the horse shall be declared a non-starter by the stewards.

(e) Should an accident or malfunction of the starting gate, or other unforeseeable event, compromise the fairness of the race or the safety of race participants, the stewards may declare individual horses to be non-starters, exclude individual horses from all pari-mutuel pools, or declare a "no contest" and refund all wagers except as otherwise provided in the rules involving multi-race wagers.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

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Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 833-6699

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SUBCHAPTER E. TRAINING FACILITIES

16 TAC §313.505, §313.507

The amendments are proposed under the Texas Revised Civil Statutes Annotated Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The amendments implement Texas Revised Civil Statutes Annotated Article 179e.

§313.505. Workout Requirements.

(a) (No change.)

(b) The person riding a horse in an official workout [~~and the person bringing a horse to a licensed training facility for an official workout~~] must hold a valid Commission license as a jockey, apprentice jockey, or exercise rider, or as the trainer or assistant trainer of the horse. [~~in the appropriate category.~~]

(c) The horse identifier shall identify each horse before each official workout. The original registration papers for each horse that is to work, or a copy that satisfies the horse identifier, must be submitted to the horse identifier before the horse's initial workout at the facility to permit the identifier to record the horse's color, gender, markings, and tattoo number, if applicable. The horse identifier shall inspect all documents of ownership, registration, or breeding necessary to ensure the proper identification of the horse. The identification procedures used at the training facility are subject to the approval of the executive secretary. The individual serving as the horse identifier may serve as timer or starter also, with the approval of the executive secretary. The timer may not serve as the starter.

(d) - (h) (No change.)

§313.507. Employees of Training Facilities.

(a) The general manager and chief executive officer of a licensed training facility must obtain a training facility general manager[~~employee~~] license from the Commission. The license fee for a training facility employee, including a general manager license, is defined in §311.5 of this title (relating to License Fees) [~~license is $20~~]. A training facility employee license may be denied, suspended, or revoked for any of the grounds listed in the Act, §7.04.

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

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Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 101. ASSESSMENT

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING THE PARTICIPATION OF LIMITED ENGLISH PROFICIENT STUDENTS IN STATE ASSESSMENTS

19 TAC §§101.1003, 101.1005, 101.1007, 101.1009 - 101.1011

The Texas Education Agency (TEA) proposes amendments to §§101.1003, 101.1005, 101.1007, and 101.1009 and new §101.1010 and §101.1011, concerning assessment. The sections address the participation of limited English proficient (LEP) students in state assessments. The proposed amendments and new sections would implement new assessment requirements for certain LEP students in accordance with House Bill (HB) 3, 81st Texas Legislature, 2009.

In June 2009, the 81st Texas Legislature enacted HB 3, which changed the requirements governing the participation of certain LEP students in the state assessment program, including additional provisions for unschooled asylees or refugees. To implement HB 3, the following revisions to 19 TAC Chapter 101, Subchapter AA, are proposed.

Section 101.1003, Role of the Language Proficiency Assessment Committee, would be amended to specify additional assessment provisions, including documentation required by the Language Proficiency Assessment Committee (LPAC). As a technical edit, the section would be reformatted for clarity.

Section 101.1005, Limited English Proficient Students at the Exit Level, would be amended to modify the criteria for postponement of the administration of exit level assessments.

Section 101.1007, Limited English Proficient Students at Grades Other Than the Exit Level, would be amended to restrict the administration of the Texas Assessment of Knowledge and Skills (TAKS) assessments in Spanish to eligible LEP students in Grades 3-5 instead of Grades 3-6; clarify the number of exemptions and administrations in Spanish allowable for an immigrant LEP student; update provisions relating to requirements of federal law and regulations; and update provisions for a LEP student whose parent or guardian declined bilingual or special language program services to incorporate HB 3 changes.

Section 101.1009, Limited English Proficient Students Who Receive Special Education Services, would be amended to specify documentation required by the LPAC and the admission, review, and dismissal (ARD) committee for LEP students served by special education; clarify the provisions for participation in assessments; and update provisions for a student whose parent or guardian declined bilingual or special language program services to incorporate HB 3 changes.

Proposed new 19 TAC §101.1010, Provisions for Unschooled Limited English Proficient Asylees and Refugees, would establish definitions of terms and set forth provisions such as exclusion of test results for state accountability purposes and administration of linguistically accommodated testing procedures for asylees and refugees.

Proposed new 19 TAC §101.1011, Student Success Initiative Grade Advancement Requirements, would specify the situations in which LEP students are not subject to grade advancement testing requirements under the Student Success Initiative.

The proposed rule actions would have data collection implications. In order to differentiate between unschooled LEP students who receive exemptions due to asylee/refugee status and LEP students who receive exemptions for other reasons, the TEA will require campuses to indicate the status of the LEP student in the Agency Use field on the assessment answer document for the 2009-2010 school year. The TEA will revisit the data implications at a later date to determine the collection method for the 2010-2011 school year. The proposed rule actions would have locally maintained paperwork requirements. LPACs would be required to maintain documentation of assessment and accommodation decisions for eligible refugees or asylees.

Criss Cloudt, associate commissioner for assessment, accountability, and data quality, has determined that for the first five-year period the amendments and new sections are in effect there will be no additional costs for state and local government as a result of enforcing or administering the amendments and new sections.

Dr. Cloudt has determined that for each year of the first five years the amendments and new sections are in effect the public benefit anticipated as a result of enforcing the rule actions will be informing educators and the public of new requirements governing the participation of certain LEP students in state assessments. There is no anticipated economic cost to persons who are required to comply with the proposed amendments and new sections.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins October 30, 2009, and ends November 30, 2009. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on October 30, 2009.

The amendments and new sections are proposed under the Texas Education Code, §39.023, which authorizes the commis-

sioner of education to adopt rules concerning the exemption of limited English proficient students from the administration of assessment instruments. Texas Education Code, §39.027, as amended by House Bill 3, 81st Texas Legislature, 2009, includes authorization for additional provisions for unschooled asylees or refugees.

The amendments and new sections implement the Texas Education Code, §§28.0211, 39.023, and 39.027.

§101.1003. Role of the Language Proficiency Assessment Committee.

(a) In accordance with the Texas Education Code, §39.023(a), (b), (c), (l), and (m) and §39.027(a), the language proficiency assessment committee (LPAC) shall select the appropriate assessment option for each limited English proficient student as outlined in this subchapter. [§101.1005 of this title (relating to Limited English Proficient Students at the Exit Level) and §101.1007 of this title (relating to Limited English Proficient Students at Grades Other Than the Exit Level). Assessment decisions must be made on an individual student basis and in accordance with administrative procedure established by the Texas Education Agency. The LPAC must document in the student's permanent record file the reason for the postponement authorized in §101.1005 or for the exemption authorized in §101.1007. A school district shall make a reasonable effort to determine a student's previous testing history.]

(b) The LPAC assessment decisions must be made on an individual student basis and in accordance with administrative procedure established by the Texas Education Agency.

(c) The LPAC must document in the student's permanent record file the reason for:

(1) a postponement authorized in §101.1005 of this title (relating to Limited English Proficient Students at the Exit Level);

(2) an exemption authorized in §101.1007 of this title (relating to Limited English Proficient Students at Grades Other Than the Exit Level); and

(3) an exclusion of the student's test results from the determination of district accreditation and performance ratings authorized in §101.1010 of this title (relating to Provisions for Unschooled Limited English Proficient Asylees and Refugees).

(d) A school district shall make a reasonable effort to determine a student's previous testing history.

§101.1005. Limited English Proficient Students at the Exit Level.

Limited English proficient (LEP) students are not eligible for an exemption from exit level testing requirements for graduation [the exit level assessment of academic skills] on the basis of limited English proficiency. However, LEP students who are recent immigrants may be granted a postponement of the administration of the exit level assessment during their first 12 months of enrollment in U.S. schools. A postponement is not permitted if a student would otherwise not be afforded the opportunity to take the exit level assessments at least one time before the student's scheduled graduation date [postpone one time the initial administration of the exit level test. The term "recent immigrant" in this section is defined as an immigrant who first enrolls in U.S. schools no more than 12 months before the administration of the test from which the postponement is sought].

§101.1007. Limited English Proficient Students at Grades Other Than the Exit Level.

(a) In Grades 3-5 [3-6], the language proficiency assessment committee (LPAC) shall determine whether a limited English proficient (LEP) student is administered the assessment of academic skills in English or in Spanish. A LEP student may be administered a Spanish version of the assessment of academic skills for a maximum of three years. If the LEP student is an immigrant, the total number of years of LEP exemption [exemptions] and years of administration [administrations] of the assessment in Spanish must not exceed three.

(b) In accordance with paragraphs (1) - (4) of this subsection, certain immigrant LEP students who have had inadequate schooling outside the United States [U.S.] may be eligible for an exemption from the assessment of academic skills during a period not to exceed their first three school years of enrollment in U.S. schools. The term "immigrant" in this subchapter is defined as a student who has resided outside the 50 U.S. states for at least two consecutive years.

(1) In Grades 2-12, an immigrant LEP student who achieves a rating of advanced high on the state-administered English language proficiency assessment in reading during the student's first school year of enrollment in U.S. schools is not eligible for an exemption in the second or third school year of enrollment in U.S. schools. An immigrant LEP student who achieves a rating of advanced or advanced high on this assessment during the student's second school year of enrollment in U.S. schools is not eligible for an exemption in the third school year of enrollment in U.S. schools.

(2) During the first school year of enrollment in U.S. schools, the immigrant student may be granted a LEP exemption if the LPAC determines that the student has not had the schooling outside the United States [U.S.] necessary to provide the foundation of learning that Texas schools require and measure on the assessment, whether the foundation be in knowledge of the English language or specific academic skills and concepts in the subjects assessed.

(3) During the second and third school year of enrollment in U.S. schools, the immigrant student whose schooling outside the United States [U.S.] was inadequate and for whom a primary language assessment is not available may be granted a LEP exemption if the LPAC determines that the student lacks the academic language proficiency in English necessary for an assessment of academic skills in English to measure the student's academic progress in a valid, reliable manner.

(4) During the second and third school year of enrollment in U.S. schools, the immigrant student whose schooling outside the United States [U.S.] was inadequate and for whom a Spanish-version assessment is available is not eligible for a LEP exemption and must take the assessment in either English or Spanish unless:

(A) the student is in an English as a second language (ESL) program, which does not call for instruction in Spanish, and the LPAC determines that the student lacks the language proficiency in English and the academic instruction in Spanish and/or literacy in Spanish for the assessment in either English or Spanish to measure the student's academic progress in a valid, reliable manner; or

(B) the student is in a bilingual education program and the LPAC has documentation, including signed verification by the parent or guardian whenever possible, that there was an extensive period of time outside the United States [U.S.] in which the student did not attend school and that this absence of schooling resulted in such limited academic achievement and/or literacy that assessment in either English or Spanish is inappropriate as a measure for school accountability. The term "extensive period of time outside the United States [U.S.]," as used in this subparagraph, shall be defined in the test administration materials.

(c) Students exempted under subsection (b) of this section shall be administered assessments in subjects and grades required by federal law and regulations in accordance with linguistically accommodated testing procedures [as] delineated in the test administration

materials. [Exempt students assessed only for federal accountability purposes shall not be subject to the grade advancement requirements under the Student Success Initiative.]

(d) A LEP student whose parent or guardian has declined the services required by the Texas Education Code, Chapter 29, Subchapter B, is not eligible for an exemption under [subsection (b) of] this section, an exit level test postponement under §101.1005 of this title (relating to Limited English Proficient Students at the Exit Level), or an exclusion of test results from the determination of district accreditation and performance ratings for unschooled asylees or refugees under §101.1010 of this title (relating to Provisions for Unschooled Limited English Proficient Asylees and Refugees). The student shall take the assessments of academic skills in English and the English language proficiency assessments required by this subchapter [§101.1001 of this title (relating to English Language Proficiency Assessments)].

(e) School districts may administer the assessment of academic skills in Spanish to a student who is not identified as limited English proficient but who participates in a [two-way] bilingual program if the LPAC determines the assessment in Spanish to be the most appropriate measure of the student's academic progress. However, the student may not be administered the Spanish-version assessment for longer than three years.

§101.1009. Limited English Proficient Students Who Receive Special Education Services.

(a) The provisions of this subchapter apply to limited English proficient (LEP) students who receive special education services except as otherwise specified in this section.

(b) The admission, review, and dismissal (ARD) committee in conjunction with the language proficiency assessment committee (LPAC) shall make decisions regarding the selection of assessments and appropriate accommodations for LEP students who receive special education services. The ARD committee shall document the decisions in the student's individualized education program, and the LPAC shall document the decisions in the student's permanent record file.

(c) In rare cases, the ARD committee in conjunction with the LPAC may determine that it is not appropriate for a LEP student who receives special education services to participate in an English language proficiency assessment required by §101.1001 of this title (relating to English Language Proficiency Assessments) for reasons associated with the student's particular disability. Specific documentation of the reason for the decision must be maintained in accordance with the documentation requirements in subsection (b) of this section.

[(c) A LEP student who receives special education services may be exempted from the English language proficiency assessments required by §101.1001 of this title (relating to English Language Proficiency Assessments) only if the ARD committee in conjunction with the LPAC determines that these assessments cannot provide a meaningful measure of the student's annual growth in English language proficiency for reasons associated with the student's disability.]

(d) The provisions of §101.1007(b) and (c) of this title (relating to Limited English Proficient Students at Grades Other Than the Exit Level) apply to the state's general and modified [alternate] assessments of academic skills.

(e) A LEP student who receives special education services and whose parent or guardian has declined the services required by the Texas Education Code, Chapter 29, Subchapter B, is not eligible for an exemption under §101.1007 of this title, an exit level test postponement under §101.1005 of this title (relating to Limited English Proficient Students at the Exit Level), or an exclusion of test results from the determination of district accreditation and performance ratings for unschooled asylees or refugees under §101.1010 of this title (relating to Provisions for Unschooled Limited English Proficient Asylees and Refugees) [on the basis of limited English proficiency].

§101.1010. Provisions for Unschooled Limited English Proficient Asylees and Refugees.

(a) The provisions of this subchapter apply to eligible limited English proficient (LEP) students whose initial enrollment in a U.S. school was as an unschooled asylee or refugee except as specified in subsection (c) of this section. In accordance with the Texas Education Code (TEC), §39.027(a)(3), "unschooled asylee or refugee" means a student who:

(1) initially enrolled in a U.S. school as:

(A) an asylee as defined by 45 Code of Federal Regulations, §400.41; or

(B) a refugee as defined by 8 United States Code, §1101;

(2) has a visa issued by the United States Department of State with a Form I-94 Arrival/Departure record, or a successor document, issued by the United States Citizenship and Immigration Services that is stamped with "Asylee," "Refugee," or "Asylum"; and

(3) as a result of inadequate schooling outside the United States, lacks the necessary foundation in the essential knowledge and skills of the curriculum prescribed under the TEC, §28.002, as determined by the language proficiency assessment committee (LPAC) established under the TEC, §29.063.

(b) An eligible student who initially enrolled in a U.S. school as an unschooled asylee or refugee and who is beyond the third school year of enrollment in U.S. schools in Grades 3-10 or who is beyond the first 12 months of enrollment in U.S. schools at the exit level is required to participate in assessments of academic skills in all subjects and grades required by state or federal law and regulations.

(c) The test results of an eligible student who initially enrolled in a U.S. school as an unschooled asylee or refugee and who is beyond the third school year of enrollment in U.S. schools in Grades 3-10 or who is beyond the first 12 months of enrollment in U.S. schools at the exit level may be excluded from the determination of district accreditation and performance ratings under the TEC, Chapter 39, through the student's fifth school year of enrollment in U.S. schools in accordance with LPAC decision-making procedures outlined in the test administration materials. In subjects and grades in which testing is required by federal law and regulations, the student whose test results are excluded shall be administered assessments using linguistically accommodated testing procedures delineated in the test administration materials. For purposes of LPAC determinations under this subsection, inadequate schooling outside the United States is defined as little or no formal schooling outside the United States such that the student lacked basic literacy in his or her primary language upon enrollment in school in the United States.

§101.1011. Student Success Initiative Grade Advancement Requirements.

Limited English proficient (LEP) students are subject to the grade advancement requirements of the Student Success Initiative authorized under the Texas Education Code (TEC), §28.0211, unless the LEP students meet the exemption criteria under §101.1007 of this title (relating to Limited English Proficient Students at Grades Other Than the Exit Level), qualify for the provisions for unschooled asylees or refugees under §101.1010(b) of this title (relating to Provisions for Unschooled Limited English Proficient Asylees and Refugees), or are otherwise not subject to the requirements established for students receiving special

education services under §101.2003(d) of this title (relating to Grade Advancement Testing Requirements).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2009.

TRD-200904647
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

CHAPTER 363. EXAMINATIONS

22 TAC §363.1

The Texas State Board of Plumbing Examiners (Board) proposes amendments to §363.1, which sets forth the registration and examination requirements for persons who wish to obtain a registration, license or endorsement issued by the Board.

The amendments to §363.1 are proposed to clarify existing requirements, in addition to new requirements added by the Senate Bill (SB) 1410, SB 1354, and House Bill (HB) 1758, 81st Legislature, Regular Session, 2009. Explanations of the proposed amendments follow:

Section 363.1(a) references a new Multipurpose Residential Fire Protection Sprinkler Specialist endorsement, added by SB 1410.

Section 363.1(b) clarifies existing requirements, including requirements for a person to hold a valid Plumber's Apprentice registration or Tradesman Plumber-Limited license while accumulating required on-the-job work hours to meet the qualifications for the Tradesman Plumber-Limited or Journeyman Plumber examinations.

Section 363.1(c) reflects new requirements of SB 1354, which requires a person to hold a Journeyman Plumber license for up to four years before applying to take a Master Plumber examination. The waiting period may be reduced to one year if the person has completed a training program approved by the United States Department of Labor Office of Apprenticeship or another nationally recognized apprentice training program accepted by the board.

Section 363.1(d) clarifies existing requirements, replaces old language which specifies certain training requirements with 48 hours of new training required by HB 1758. This classroom training is required in addition to the 8,000 hours of on-the-job training required for the Journeyman Plumber examination, under §1301.002 of the Plumbing License Law. The proposed amendments to this section reflect further requirements of HB 1758 and SB 1354, by providing an exemption to the 48 hours of training, allowing the Board to credit certain applicants with up to 500 hours of on-the-job training, and allowing a person who holds an associate of applied science degree in plumbing technology to take the Journeyman Plumber examination, if the Board approves the plumbing technology program.

Section 363.1(e) clarifies existing requirements and reflects new requirements of SB 1354 and HB 1758 including 24 hours of training. This classroom training is required in addition to the 4,000 hours of on-the-job training required for the Tradesman Plumber-Limited examination, under §1301.002 of the Plumbing License Law.

The new requirements provide an exemption to the 24 hours of training, allow the Board to credit certain applicants with up to 500 hours of on-the-job training, and allow a person who holds an associate of applied science degree in plumbing technology to take the Tradesman Plumber-Limited examination, if the Board approves the plumbing technology program.

Section 363.1(h) reflects the new requirements of SB 1410 for applicants who apply for a new Multipurpose Residential Fire Protection Sprinkler Specialist endorsement.

Section 363.1(j), 363.1(k) and 363.1(l), clarify existing supervision requirements of Residential Utility Installers, Drain Cleaners and Drain Cleaner-Restricted registrants.

Texas Government Code §2006.002, as amended by the 80th Legislature, HB 3430, requires an agency to perform an Economic Impact Statement and Regulatory Flexibility Analysis if a proposed rule could have an adverse economic impact on small businesses. The Board licenses individuals and not businesses. Only individuals may hold a plumbing license, endorsement or registration. Because the Board does not license businesses or require businesses to meet the examination and registration requirements set forth in these amendments, the rule amendments will have no mandated adverse economic impact on small businesses.

Robert L. Maxwell, Executive Director, has determined that each year of the first five years the amendments are in effect, there will be an initial economic impact on the persons required to comply with §363.1(d) and (e), which reflects the new classroom training requirements of HB 1758. The Board will not regulate the prices charged by providers of the 24 and 48 hours of classroom training required by these amendments. A survey of possible providers of the new classroom training classes indicated that the amounts paid by applicants would likely vary among providers. However, the survey estimates indicated that applicants may pay approximately ten dollars ($10) per hour of classroom training, or $240 for the 24 hours required for the Tradesman Plumber-Limited training course and $480 for the Journeyman Plumber training course. Plumber's Apprentices who have only recently begun accumulating the required on-the-job training hours, will be able to spread these costs for the classroom training over two or more years. Plumber's Apprentices who are nearing completion of the required on-the-job training hours, could incur the total cost for the classroom training immediately prior to qualifying for examination. It could be assumed that as a result of the classroom training, an applicant's ability to pass a license examination on the first attempt would increase, on average. It could also be assumed that because the individual may become licensed sooner, the individual's earning potential could also increase sooner, on average. The increase in earning potential over a five year period, could have the effect of neutralizing the initial cost outlay by the applicant for the training.

Additionally, Mr. Maxwell has determined that each year of the first five years the amendments are in effect there should be no

mandated adverse economic impact on local or state government.

Mr. Maxwell also has determined that each year of the first five years the amendments are in effect the public benefit anticipated as a result of these amendments will be notification to applicants for registration and examination of the requirements of the new requirements of SB 1410, SB 1354 and HB 1758. The public healthy and safety will also benefit from better trained plumbers.

Comments on the proposal may be submitted within 30 days of publication in the *Texas Register,* to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The amendments to §363.1 are proposed under and affect Title 8, Chapter 1301, Occupations Code ("Plumbing License Law"), as amended by SB 1354, SB 1410 and HB 1758, 81st Legislature, Regular Session, 2009, §1301.251, and the rule it amends. Section 1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. The amendments to §363.1 are also proposed under Texas Government Code §2006.002, as amended by the 80th Legislature, HB 3430, which requires an agency to perform an Economic Impact Statement and Regulatory Flexibility Analysis if a proposed rule could have an adverse economic impact on small businesses.

No other statute, article or code is affected by this proposed amendment.

§363.1. Qualifications.

(a) An applicant may qualify for a Master Plumber License, Journeyman Plumber License, Tradesman Plumber-Limited License, Plumbing Inspector License, Plumber's Apprentice Registration, Residential Utilities Installer Registration, Drain Cleaner Registration or Drain Cleaner-Restricted Registration. A Master or Journeyman Plumber License may contain a Medical Gas Piping Installation Endorsement, Multipurpose Residential Fire Protection Sprinkler Specialist Endorsement, or Water Supply Protection Specialist Endorsement. In order to qualify for any of the licenses or endorsements an applicant must meet all the requirements of the Board, successfully complete the required examination and remit the appropriate fee. In order to qualify for any of the registrations an applicant must meet all the requirements of the Board and remit the appropriate fee.

(b) When a Plumber's Apprentice or Tradesman Plumber-Limited license holder [~~Licensee~~] applies to take an examination, he/she must submit the Employer's Certification. This form certifies the Applicant's work experience complies with the eligibility criteria for the examination. If the applicant has met the criteria through employment with one employer, the Employer's Certification must be completed by that employer. However, if the applicant has met the criteria through employment with various employers, then the Employer's Certification must be submitted from each of those employers. Therefore, the Board recommends that the applicant request an employer complete the Employer's Certification annually and each time the Applicant discontinues employment with a particular employer. A Licensee is required to complete the Employer's Certification form within 30 days of a request by any individual who has worked as a Plumber's Apprentice or Tradesman Plumber-Limited license holder [~~Licensee~~] under the Licensee's supervision. It is the responsibility of the Applicant to supply the Licensee with the Employer's Certification form.

(1) In accordance with the requirements of §1301.002 and §1301.354, of the Plumbing License Law, a person may receive credit for on-the-job work hours required to qualify for a Tradesman Plumber-Limited or Journeyman Plumber examination, only while the person holds a valid Plumber's Apprentice registration; or

(2) a valid Tradesman Plumber-Limited license.

(c) Master Plumber. Each applicant must:

(1) be licensed either as:

(A) a Journeyman Plumber in Texas or another state with at least 8,000 hours working at the trade under a Responsible Master Plumber and must have held the Journeyman License for at least: [~~one year before filing the Master Plumber application; or~~]

(i) four years; or

(ii) one year and have successfully completed a training program approved by the United States Department of Labor Office of Apprenticeship or another nationally recognized apprentice training program accepted by the board; or

(B) a Master Plumber in another state who has met the requirements in subparagraph (A) of this paragraph;

(2) be a high school graduate or hold a General Equivalency Diploma (GED); and

[~~(3) maintain a single registered mailing address that the Board shall regard as the applicant's principal business address for communication and record keeping purposes.~~]

(3) [~~(4)~~] be a citizen or national of the United States or an alien or non-immigrant eligible for licensure by the State of Texas.

(d) Journeyman Plumber.

(1) Each applicant must:

(A) [~~(1)~~] be a high school graduate or hold a General Equivalency Diploma (GED); [~~and~~]

(B) [~~(2)~~] be a citizen or national of the United States or an alien or non-immigrant eligible for licensure by the State of Texas;

(C) [~~(3)~~] have either of the following:

(i) [~~(A)~~] A current Plumber's Apprentice Registration or Tradesman Plumber-Limited [~~Licensee~~] and at least 8,000 hours of experience working at the trade under the supervision of a Responsible Master Plumber, as verified by employers; or

(ii) [~~(B)~~] a valid Journeyman License from another state and at least 8,000 hours of experience working at the trade under the supervision of a Master Plumber;

(D) complete 48 hours of classroom training provided by a board-approved instructor in a board-approved training program in the areas of health and safety, applicable plumbing codes, and water conservation, as provided by §363.12 of this chapter (relating to Training Programs for Journeyman Plumber and Tradesman Plumber-Limited License Applicants).

[~~(4) meet the minimum trade experience requirements set forth in subparagraphs (A) - (F) of this paragraph.~~]

[~~(A) 2,000 hours in the installation or repair of piping for waste and vent drainage systems. During this period an individual should obtain the proper knowledge and skill to install or repair different types of materials used in residential or commercial plumbing systems, e.g., cast iron, plastics, copper.~~]

[~~(B) 2,000 hours in the installation or repair of piping for domestic hot and cold water systems. During this period an individual should obtain the proper knowledge and skill to install or repair different types of materials used in residential or commercial plumbing~~

~~systems, e.g., cast iron, plastics, copper, steel and understand the function, difference, and proper installation of various valves, e.g., gate, globe, mixing, etc.]~~

~~[(C) 2,000 hours in the installation or repair of fixtures and equipment common to residential or commercial plumbing systems. During this period an individual should obtain the proper knowledge and skill to install or repair different types of products used, e.g., water heaters, natural and L.P. gas fired equipment, plumbing fixtures, faucets, water softeners and similar equipment and understand the proper method for sizing and installation of gas appliance vents.]~~

~~[(D) 500 hours in the installation or repair of Piping Hangers and Pipe Support systems. During this period an individual should obtain the proper knowledge and skill to install different types of hangers for piping support.]~~

~~[(E) 1,000 hours in the installation or repair of Special Plumbing systems. During this period an individual should obtain the proper knowledge and skill regarding medical gas systems, decorative fountains, lawn irrigation systems and solar panels.]~~

~~[(F) 500 hours of understanding and implementing the Americans with Disabilities Act. During this period an individual should become knowledgeable in model plumbing codes and job safety and OSHA requirements as they apply to the plumbing profession.]~~

(2) At the applicant's request, the board may credit an applicant for the Journeyman Plumber examination with up to 500 hours of the work experience required before taking an examination if the applicant has completed the classroom portion of a training program:

(A) approved by the United States Department of Labor, Office of Apprenticeship; or

(B) provided by a person approved by the board and based on course materials approved by the board.

(3) Notwithstanding the training required by paragraph (1) of this subection, a Plumber's Apprentice may apply for and take an examination for a license as a Journeyman Plumber if the apprentice has received an associate of applied science degree from a plumbing technology program that:

(A) includes a combination of classroom and on-the-job training; and

(B) is approved by the board and the Texas Higher Education Coordinating Board.

(4) A Plumber's Apprentice who is enrolled in good standing in a training program approved by the United States Department of Labor, Office of Apprenticeship, may take a Journeyman Plumber examination without completing the classroom training required by paragraph (1)(D) of this subection.

(e) Tradesman Plumber-Limited [~~Licensee~~].

(1) Each applicant must:

(A) [~~(1)~~] be a citizen or national of the United States or an alien or non-immigrant eligible for licensure by the State of Texas; and

(B) [~~(2)~~] have either of the following:

(i) [~~(A)~~] Plumber's Apprentice Registration and have completed at least 4,000 hours of experience working at the trade as a Registered Plumber's Apprentice under the direct supervision of a Tradesman Plumber-Limited, Journeyman Plumber, or Master Plumber, and the supervision of a Responsible Master Plumber, as verified by employers; or

(ii) [~~(B)~~] a valid Journeyman or Master License from another state and at least 4,000 hours of experience working at the trade under the supervision of a Master Plumber;

(C) complete 24 hours of classroom training provided by a board-approved instructor in a board-approved training program in the areas of health and safety, applicable plumbing codes, and water conservation, as provided by §363.12 of this chapter.

(2) At the applicant's request, the board may credit an applicant for the Tradesman Plumber-Limited examination with up to 500 hours of the work experience required before taking an examination if the applicant has completed the classroom portion of a training program:

(A) approved by the United States Department of Labor, Office of Apprenticeship; or

(B) provided by a person approved by the board and based on course materials approved by the board.

(3) Notwithstanding the training required by paragraph (1) of this subection, a plumber's apprentice may apply for and take an examination for a license as a Tradesman Plumber-Limited if the apprentice has received an associate of applied science degree from a plumbing technology program that:

(A) includes a combination of classroom and on-the-job training; and

(B) is approved by the board and the Texas Higher Education Coordinating Board.

(4) A plumber's apprentice who is enrolled in good standing in a training program approved by the United States Department of Labor, Office of Apprenticeship, may take a Tradesman Plumber-Limited examination without completing the classroom training required by paragraph (1)(C) of this subsection.

(f) Plumbing Inspector. Each applicant must:

(1) be a citizen or national of the United States or an alien or non-immigrant eligible for licensure by the State of Texas;

(2) be a high school graduate or hold a General Equivalency Diploma (GED); and

(3) have one of the following:

(A) a Journeyman or Master Plumber License issued in the state of Texas;

(B) a Journeyman or Master Plumber License issued in another state, provided he or she passes the Texas State Board of Plumbing Examiners Journeyman exam;

(C) a Plumbing Inspector license issued by another state with licensing requirements substantially equivalent to the licensing requirements of the Texas State Board of Plumbing Examiners;

(D) a professional engineer or a professional architect license issued in this state; or

(E) a total of 500 hours training or experience in the plumbing industry, that shall be credited by any combination of the following:

(i) 100 hours credit for successful completion of a certification in the Uniform Plumbing Code or the International Plumbing Code, issued by the International Association of Plumbing and Mechanical Officials (IAPMO), International Conference of Building Officials (ICBO), Building Officials and Code Administrators Inter-

national (BOCA) or Southern Building Code Congress International (SBCCI) plumbing code certification;

(ii) 100 hours credit for successful completion of a Board approved Medical Gas Piping Installation Endorsement Training Program;

(iii) 50 hours credit for successful completion of a Board approved Water Supply Protection Specialist Endorsement Training Program;

(iv) 100 hours credit for successful completion of an approved Backflow Tester Certification program;

(v) 6 hours credit for successful completion of each different Board approved Continuing Professional Education for Licensed Plumbers and Plumbing Inspectors Course;

(vi) actual hours, with a maximum of 100 hours credit for approved, documented and verified plumbing related training academy or educational sessions;

(vii) actual hours, with a maximum of 200 hours credit for on the job work experience in the plumbing trade or approved similar plumbing related trade, as verified by former employers; or

(viii) actual hours, with a maximum of 200 hours credit for documented and verified on the job training in the enforcement of plumbing codes under the direct supervision of a Licensed Plumbing Inspector.

(g) Medical Gas Piping Installation Endorsement. Each applicant must:

(1) hold a current Journeyman or Master Plumber License; and

(2) have successfully completed a Board approved training program in medical gas piping installation which includes the standards contained in the latest edition of the National Fire Protection Association (NFPA) 99C Gas and Vacuum Systems.

(h) Multipurpose Residential Fire Protection Sprinkler Specialist Endorsement. Each applicant must:

(1) hold a Journeyman or Master Plumber license; and

(2) have successfully completed a training program approved by the board that provides the training necessary for the proper installation of a multipurpose residential fire protection sprinkler system as required by the applicable codes and standards recognized by the state.

(i) [~~(h)~~] Water Supply Protection Specialist Endorsement. Each applicant must:

(1) hold a current Journeyman or Master Plumber License;

(2) have successfully completed a Board approved training program in backflow prevention; and

(3) have successfully completed a Board approved training program designed around the Federal Safe Drinking Water Act and the Federal Clean Water Act, on-site wastewater and site evaluations and graywater re-use, water quality training and water treatment, water utilities systems and regulations, water conservation, xeriscape irrigation, fire protection systems, and state laws regulating lead contamination in drinking water.

(j) [~~(i)~~] Residential Utilities Installer. Each Applicant must:

(1) be a citizen or national of the United States or an alien or non-immigrant eligible for licensure by the State of Texas;

(2) be registered as a Plumber's Apprentice;

(3) have completed at least 2,000 hours working at the trade as a Registered Plumber's Apprentice under the direct supervision of a Tradesman Plumber-Limited, Journeyman Plumber, or Master Plumber, and the supervision of a Responsible Master Plumber, as verified by employers; and

(4) complete a Board approved training program. [~~:~~]

[~~(A) after registering as a Residential Utilities Installer and prior to March 1, 2003; or~~]

[~~(B) prior to registering as a Residential Utilities Installer, if registering after March 1, 2003.~~]

(k) [~~(j)~~] Drain Cleaner. Each Applicant must:

(1) be a citizen or national of the United States or an alien or non-immigrant eligible for licensure by the State of Texas;

(2) be registered as a Plumber's Apprentice;

(3) have completed at least 4,000 hours working at the trade as a Drain Cleaner-Restricted Registrant under the supervision of a Responsible Master Plumber, as verified by employers; and

(4) complete a Board approved training program. [~~:~~]

[~~(A) after registering as a Drain Cleaner and prior to March 1, 2003; or~~]

[~~(B) prior to registering as a Drain Cleaner, if registering after March 1, 2003.~~]

(l) [~~(k)~~] Drain Cleaner-Restricted Registrant. Each Applicant must:

(1) be a citizen or national of the United States or an alien or non-immigrant eligible for licensure by the State of Texas;

(2) be registered as a Plumber's Apprentice, working under the direct supervision of a Tradesman Plumber-Limited, Journeyman Plumber, or Master Plumber, and under the supervision of a Responsible Master Plumber;

(3) complete a Board approved training program. [~~:~~]

[~~(A) after registering as a Drain Cleaner and prior to March 1, 2003; or~~]

[~~(B) prior to registering as a Drain Cleaner, if registering after March 1, 2003.~~]

(m) [~~(l)~~] Plumber's Apprentice. Each applicant must:

(1) be a citizen or national of the United States or an alien or non-immigrant eligible for licensure by the State of Texas; and

(2) be at least sixteen (16) years of age.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904746
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 936-5224

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22 TAC §363.11

The Texas State Board of Plumbing Examiners (Board) proposes amendments to §363.11, which sets forth the criteria for training programs required as a prerequisite to examinations for Medical Gas Piping Installation, Water Supply Protection Specialist, and Multipurpose Residential Fire Protection Sprinkler Specialist endorsements administered by the Board.

The amendments to §363.11 are proposed in response to the passage of Senate Bill (SB) 1410, 81st Legislature, Regular Session, 2009, which provides for a new Multipurpose Residential Fire Protection Sprinkler Specialist license endorsement. The new endorsement will allow a Journeyman or Master Plumber who holds the endorsement to install multipurpose residential fire protection sprinkler systems in one or two family dwellings, in accordance with the National Fire Protection Association (NFPA) standard 13D. The new endorsement provides for the installation and not the design of the systems. The proposed amendments will also reorganize the current rule, resulting in a clearer understanding of current and new requirements.

Section 363.11(a) establishes the general requirements for continuing education Course Providers to offer the training programs. It also sets forth the prerequisites that a Course Instructor must meet prior to instructing applicants for the endorsement examination.

Section 363.11(a) allows any person to apply to the Board to be approved as a Course Provider. This subsection allows a Journeyman Plumber, Master Plumber, or Plumbing Inspector to apply through a Course Provider to be approved as a Course Instructor. Course Instructors must have completed at least 40 hours of instructor training at the time of application and must complete a total of 160 hours of "train-the-trainer" training within a four year period to maintain approval as a Course Instructor. Section 363.11(a) sets forth additional requirements for Course Providers and Course Instructors and notifies Course Providers and Course Instructors that they may be subject to disciplinary action for a violation of §363.11.

Section 363.11(b) establishes the minimum criteria for the Medical Gas Piping Installation endorsement training program. The proposed language does not change the current training program criteria. The proposed amendments delete superfluous language regarding Course Providers and Course Instructors, which may be relocated to §363.11(a).

Section 363.11(c) sets forth the minimum criteria for the Water Supply Protection Specialist endorsement training program. The proposed language does not change the current training program criteria. The proposed amendments delete superfluous language regarding Course Providers and Course Instructors, which may be relocated to §363.11(a).

Section 363.11(d) sets forth the minimum criteria for the new Multipurpose Residential Fire Protection Sprinkler Specialist endorsement training program. Section 363.11(d) does not address all requirements for the installation of multipurpose residential fire protection sprinkler systems. Additional rule amendments to appropriate rule sections to address certain definitions, scope of work provided to the holder of the endorsement, requirements for plumbing companies which will install the systems and other specific requirements for the installations are forthcoming. As with the proposal of §363.11, the Board will collaborate with the State Fire Marshal's Office in developing the additional rule proposals.

The proposed language in §363.11(d) provides for a training program based on subject matter applicable to a multipurpose dwelling fire sprinkler system, as required by the National Fire Protection Association (NFPA) Standard 13D. The proposed language requires the training program to be at 24 hours in length and incorporate the training criteria included in the American Society of Sanitary Engineering Series 7000, as it relates to plumbing-based residential fire protection systems installers for one and two family dwellings. The proposed language of §363.11(d) states how increments of the 24 hour program should be minimally provided, based on recommendations from the Assistant State Fire Marshal, Director of Licensing, State Fire Marshal's Office.

For the purposes of implementing the training program and qualifying initial Course Instructors, §363.11(d)(4) allows the Board to approve temporary exemptions to the Course Instructor requirements set forth in proposed §363.11(a). Applicants for exemption to the requirements would apply to the Board and state the exemption requested along with the justification for the exemption for consideration by the Board. Any exemptions approved by the Board would expire on September 1, 2010, when all Course Instructors would be required to meet all requirements of §363.11.

Texas Government Code §2006.002, as amended by the 80th Legislature, House Bill 3430, requires an agency to perform an Economic Impact Statement and Regulatory Flexibility Analysis if a proposed rule could have an adverse economic impact on small businesses. The proposed amendments to §363.11 will have no mandated adverse economic impact on small businesses.

Robert L. Maxwell, Executive Director, has determined that each year of the first five years the amendments are in effect that there will be no mandated fiscal impact on state and local government, as well as small businesses and persons required to comply with these amendments. It may be assumed that individuals who choose to obtain an endorsement under the proposed rule would pay a fee, unregulated by the Board, to Course Providers for training programs required under §363.11. It may also be assumed that either Course Providers or Course Instructors would pay a fee, unregulated by the Board, to obtain the training required for Course Instructors under §363.11.

Mr. Maxwell also has determined that public health and safety will be enhanced during each year of the first five years that the amendments are in effect. If this rule is adopted, it will mark the first time that a state agency mandates that every person who performs the hands-on installation of multipurpose residential fire protection sprinkler systems receive training in accordance with state law and NFPA 13D and pass the required examination. Requiring the training programs to be instructed by individuals who must complete rigorous instructional training requirements will help ensure quality instruction to the applicants for the endorsement.

Comments on the proposal may be submitted within 30 days of publication in the *Texas Register,* to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The amendments to §363.11 are proposed under and affect Chapter 1301 of the Texas Occupations Code ("Plumbing License Law"), specifically Plumbing License Law §1301.251, SB

1410, 81st Legislature, Regular Session, 2009 and the rule it amends. Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. Senate Bill 1410 creates the Multipurpose Residential Fire Protection Sprinkler Specialist endorsement and authorizes the Board to issue such an endorsement to a Master or Journeyman Plumber who has completed a Board approved training course and has passed the examination required by the Board. The amendments to §363.11 may also affect fire sprinkler rules, 28 TAC §§34.700 et seq., in that the rules will be referenced in a training program and SB 1410 requires the Board to collaborate with the State Fire Marshal's Office in development of the rule. The amendments to §363.11 are also proposed under Texas Government Code §2006.002 which requires an agency to perform an Economic Impact Statement and Regulatory Flexibility Analysis if a proposed rule could have an adverse economic impact on small businesses.

No other statute, article, or code is affected by this proposed amendment.

§363.11. Endorsement Training Programs.

(a) General requirements for Course Providers and Course Instructors

(1) Any person who seeks to provide a training program as a prerequisite for qualifying to take an examination to obtain any endorsement issued by the Board, may apply to the Board for approval as a Course Provider.

(2) Any person who seeks to provide instruction of such training programs must be employed by an approved Course Provider. He or she may apply to the Board through an approved Course Provider to be approved as a Course Instructor.

(A) Each Course Instructor must be:

(i) a licensed Journeyman or Master Plumber and hold the particular endorsement relevant to the training program that the Course Instructor will teach; or

(ii) a licensed Plumbing Inspector who has completed the training and examination requirements required to obtain the particular endorsement relevant to the training program that the Course Instructor will teach.

(B) Each Course Instructor will be required to successfully complete a Board approved instructor training program of 160 hours which meets the following criteria:

(i) 40 hours to provide the instructor with the basic educational techniques and instructional strategies necessary to plan and conduct effective training programs;

(ii) 40 hours to provide the instructor with the basic techniques and strategies necessary to analyze, select, develop, and organize instructional material for effective training programs;

(iii) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to establish and maintain effective relationships with students, co-workers, and other personnel in the classroom, industry, and community; and

(iv) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to communicate effectively with the use of instructional media.

(C) To maintain status as an approved Course Instructor of an endorsement training program, the Course Instructor shall undergo one of the instructor training programs required under subparagraph (B) of this paragraph every twelve (12) months such that the entire training (160 hours) is completed within four years.

(3) Course Providers and Course Instructors shall adhere to the instruction criteria approved by the Board in this section, and ensure that only students who receive the specified number of contact hours of instruction (excluding any time spent on breaks from instruction) receive credit for completing the training required by this section.

(4) The training required by this section may be provided in increments, as appropriate, and the Course Provider or Course Instructor shall provide a certificate of completion to the student, upon completion of the training.

(A) The certificate of completion shall state:

(i) the title of the training program related to the particular endorsement;

(ii) the names of the Course Provider and Course Instructor;

(iii) the name and license number of the student; and

(iv) the date that the instruction was completed.

(B) The Course Provider shall maintain a record of the information contained on each certificate of completion for at least two years.

(5) Each Course Provider shall notify the Board at least seven (7) days before conducting training programs or electronically post notice of the class schedule on the provider's website at least seven (7) days before conducting a class. The notice shall contain the date(s), time(s) and place(s) where the class(es) will occur.

(6) Each Course Provider shall perform self-monitoring to ensure compliance with this section and reporting as required by the Board.

(7) The Board may monitor endorsement training programs to ensure compliance with this section.

(8) Any failure on the part of a Course Provider or Course Instructor to abide by the requirements of this section may result in the denial, probation, suspension, or revocation of Board approval as a Course Provider or Course Instructor.

(b) [~~(a)~~] Medical Gas Piping Installation Endorsement training programs

(1) Before a Journeyman or Master Plumber may qualify to take the Medical Gas Piping Installation endorsement examination, the applicant must complete a training program approved by the Board which pertains to subject matter applicable to the installation of medical gas piping systems. As a minimum, the training course shall be based on [~~Any person wishing to offer a training program in medical gas piping installation to the public must meet criteria as prescribed by the Board, including~~] the standards contained in the latest edition of the National Fire Protection Association (NFPA) 99C Gas and Vacuum Systems. [~~Instructors shall be employed by a program that meets certification requirements of the Board.~~]

(2) Course Providers [~~Such persons~~] shall provide lesson plans [~~and instructor credentials~~] for Board approval. Approved Course Providers [~~providers~~] of medical gas training shall furnish a program consisting of a classroom presentation of course material, a test of the enrollee's comprehension of the matter, a shop demonstration of the proper brazing procedures by the Course Instructor [~~instructor~~], and the enrollee's final brazing evidence to the instructor of an accepted vertical and horizontal practice coupon.

(A) A minimum of twenty four (24) hours shall be assigned for the classroom presentation and testing.

(B) In addition, a minimum of four (4) hours shall be assigned to the brazing demonstrations. The student enrolled in medical gas training will have completed a minimum of eight hours of practice brazing coupons in an equipped shop. These coupons will be presented to the Course Instructor [~~instructor~~] for grading.

(C) The aforementioned hours represent the minimum requirements only; additional time may be included in each segment of the program.

[~~(2) Training programs in Medical Gas Piping Installation shall be reviewed at least annually by the Board to ensure that programs have been provided equitably across the State of Texas.~~]

[~~(3) Periodically, the Board shall review training programs in medical gas piping installation for quality in content and instruction in accordance with the standards contained in the latest edition of the National Fire Protection Association (NFPA) 99C Gas and Vacuum Systems.~~]

[~~(4) Instructors in medical gas piping installation will be a Licensee of the Board with a Medical Gas Piping Installation Endorsement. Instructors will be required to successfully complete a Board approved program of 160 hours which meets the following generic criteria:~~]

[~~(A) 40 hours to provide the instructor with the basic educational techniques and instructional strategies necessary to plan and conduct effective training programs.~~]

[~~(B) 40 hours to provide the instructor with the basic techniques and strategies necessary to analyze, select, develop, and organize instructional material for effective training programs.~~]

[~~(C) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to establish and maintain effective relationships with students, co-workers, and other personnel in the classroom, industry, and community.~~]

[~~(D) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to communicate effectively with the use of instructional media.~~]

[~~(5) To maintain his/her status as an approved instructor of medical gas piping installation training, the instructor shall undergo one of the aforementioned training programs every twelve (12) months such that the entire training (160 hours) is completed within four years.~~]

[~~(6) Each approved provider must notify the Board thirty (30) days before conducting classes; the notice shall contain the date(s), time(s) and place(s) where the classes will occur.~~]

[~~(7) Each approved provider will perform self-monitoring and reporting as required by the Board.~~]

(c) [~~(b)~~] Water Supply Protection Specialist Endorsement training programs

(1) Before a Journeyman or Master Plumber may qualify to take the Water Supply Protection Specialist endorsement examination, the applicant must complete a training program approved by the Board, which pertains to subject matter applicable to the protection of public and private potable water supplies, as required by the plumbing codes, laws and regulations of this state.

(2) [~~(1)~~] Any person wishing to offer a Board approved training program in Water Supply Protection Specialist Endorsement to the public must submit a course outline, together with the number of hours of instruction, to the Board for approval. [~~meet criteria as prescribed by the Board. Instructors shall be employed by a program that meets certification requirements of the Board. Such persons shall provide lesson plans and instructor qualifications for Board approval. The Board shall provide a course outline and the required minimum hours.~~]

(3) The Board may require resubmission for approval of any previously approved Water Supply Protection Specialist endorsement training program to ensure that the program meets current requirements of the plumbing codes, laws, and regulations of the state which pertain to the protection of public and private potable water supplies.

[~~(2) Periodically, the Board shall review Board approved training programs in Water Supply Protection Specialist Endorsement for quality in content and instruction and ensure that programs have been provided equitably across the State of Texas.~~]

[~~(3) Instructors in water supply protection will be required to pass the Board examination in water supply protection and be a Licensee of the Board with a Water Supply Protection Specialist Endorsement. Instructors will be required to successfully complete a Board approved program of 160 hours which meets the following generic criteria.~~]

[~~(A) 40 hours to provide the instructor with the basic educational techniques and instructional strategies necessary to plan and conduct effective training programs.~~]

[~~(B) 40 hours to provide the instructor with the basic techniques and strategies necessary to analyze, select, develop, and organize instructional material for effective training programs.~~]

[~~(C) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to establish and maintain effective relationships with students, co-workers, and other personnel in the classroom, industry, and community.~~]

[~~(D) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to communicate effectively with the use of instructional media.~~]

[~~(4) To maintain his/her status as an approved instructor of Water Supply Protection Specialist Endorsement training, the instructor shall undergo one of the aforementioned training programs every twelve (12) months such that the entire training (160 hours) is completed within four years.~~]

[~~(5) Each approved provider must notify the Board thirty (30) days before conducting classes; the notice shall contain the date(s), time(s) and place(s) where the classes will occur.~~]

[~~(6) Each approved provider will perform self-monitoring and reporting as required by the Board.~~]

(d) Multipurpose Residential Fire Protection Sprinkler Specialist Endorsement training programs

(1) Before a Journeyman or Master Plumber may qualify to take the Multipurpose Residential Fire Protection Sprinkler Specialist endorsement examination, the applicant must complete a training program which pertains to subject matter applicable to a multipurpose dwelling fire sprinkler system, as required by the National Fire Protection Association (NFPA) Standard 13D.

(2) The training program must incorporate the training criteria included in the American Society of Sanitary Engineering Series 7000, as it relates to plumbing-based residential fire protection systems installers for one and two family dwellings.

(3) The training program must be at least 24 hours in length, using the following minimum guidelines:

(A) 1 hour to review applicable standards, codes, and laws, including the Plumbing License Law, Board Rules and the fire sprinkler rules, 28 TAC §§34.700 et seq., and their integration and identifying the enforcing authorities;

(B) 4 hours to study definitions, to identify as a minimum the various types, specific parts, specific terminology and concepts of the system;

(C) 4 hours to learn the acceptable type, material, location, limitation and correct installation of equipment including but not limited to pipe, fittings, valves, types of sprinkler heads, supports, drains, test connections, automatic by-pass valve, smoke alarm devices, other appurtenances;

(D) 2 hours to learn the acceptable type, configuration, and material which may or may not be required for a water supply including but not limited to backflow preventers, shut off valves, water meters, water flow detectors, tamper switches, test connections, pressure gages, minimum pipe sizes, storage tanks, and wells including the ability to perform a water flow test of a city water supply;

(E) 8 hours to learn which rooms require sprinklers and the correct positioning of a sprinkler head based on its type, listing, temperature rating, and the building structure including but not limited to understanding the concepts of the area of coverage, spacing, distance from walls and ceilings, listing limitations, dead air pockets, manufacturer's requirements and obtaining knowledge of how structural features such as flat, sloped, pocket, or open joist ceilings, close proximity to heat sources and other obstructions such as ceiling fans, surface mounted lights, beams, and soffits may adversely influence the location of a sprinkler head;

(F) 3 hours to learn critical hydraulic concepts for the installer that may adversely affect the original design plan due to field construction changes including but not limited to remote area sprinkler operation, flow versus pressure, elevation pressure loss, sprinkler K-factors, fixture units, minimum pipe diameters, additional pipe lengths and understand which household water appliances affect or do not affect the sprinkler hydraulics/performance; and

(G) 2 hours to learn the required testing, maintenance and documentation including but not limited to the final inspection and tests normally required by the local fire official (AHJ), when permits, working plans, as-built plans or hydraulic calculations are required and who provides for the system maintenance and instructions.

(4) Prior to September 1, 2010, the Board may approve alternative training programs and temporary exemptions to Multipurpose Residential Fire Protection Sprinkler Specialist Endorsement training program Course Instructors requirements for the purposes of implementing the Multipurpose Residential Fire Protection Sprinkler Specialist Endorsement training programs and qualifying initial Course Instructors.

(A) Any person wishing to apply to the Board for an exemption or alternate training under paragraph (2) of this subsection must provide the justification for the exemption or alternate training for consideration by the Board.

(B) Any exceptions and exemptions allowed under paragraph (2) of this subsection would expire on September 1, 2010 and all Course Instructors approved by the Board will be required to meet all requirements under this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904747
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 936-5224

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22 TAC §363.12

The Texas State Board of Plumbing Examiners (Board) proposes new §363.12, which sets forth training criteria for applicants for Journeyman Plumber and Tradesman Plumber-Limited licenses. This bill is proposed for adoption in response to the passage of House Bill (HB) 1758, 81st Legislature, Regular Session, 2009. House Bill 1758 requires that applicants for a Tradesman Plumber-Limited license or Journeyman Plumber license complete 24 or 48 hours of classroom training provided by a board-approved instructor in a board-approved training program in the areas of health and safety, the latest versions of plumbing codes adopted by the Board, and water conservation. This classroom training is required in addition to the 4,000 hours of on-the-job training required for the Tradesman Plumber-Limited examination and the 8,000 hours of on-the-job training required for the Journeyman Plumber examination, under §1301.002 of the Plumbing License Law.

Section 363.12 sets forth an outline for Board approved providers and instructors to follow when providing the required instruction to potential applicants for the Tradesman Plumber-Limited and Journeyman Plumber examinations. The new rule also establishes criteria for Board approval of providers and instructors. Additionally, the new rule generally describes the standards under which the classroom instruction shall be provided and the issuance of completion certificates to students.

Texas Government Code §2006.002, as amended by the 80th Legislature, HB 3430, requires an agency to perform an Economic Impact Statement and Regulatory Flexibility Analysis if a proposed rule could have an adverse economic impact on small businesses. The Board licenses individuals and not businesses. Only individuals may hold a plumbing license, endorsement or registration. Because the Board does not license businesses or require businesses to meet the examination and registration requirements set forth in this new rule, the rule will have no mandated adverse economic impact on small businesses.

Robert L. Maxwell, Executive Director, has determined that each year of the first five years the new rule is in effect, there will be an initial economic impact on the persons required to comply with the new rule. The Board will not regulate the prices charged by providers of the 24 and 48 hours of classroom training required by the new rule. A survey of possible providers of the new classroom training classes indicated that the amounts paid by applicants would likely vary among providers. However, the survey estimates indicated that applicants may pay approximately ten dollars ($10) per hour of classroom training, or $240 for the 24 hours required for the Tradesman Plumber-Limited training course and $480 for the Journeyman Plumber training course. Plumber's Apprentices, who have only recently begun accumulating the required on-the-job training hours, will be able to spread these costs for the classroom training over two or more years.

Plumber's Apprentices, who are nearing completion of the required on-the-job training hours, could incur the total cost for the classroom training immediately prior to qualifying for examination. It could be assumed that as a result of the classroom training, an applicant's ability to pass a license examination on the first attempt would increase, on average. It could also be assumed that because the individual may become licensed sooner, the individual's earning potential could also increase sooner, on average. The increase in earning potential over a five year period could have the effect of neutralizing the initial cost outlay by the applicant for the training.

Additionally, Mr. Maxwell has determined that for the first five-year period the new rule is in effect there will be no fiscal impact on state and local government as well as small businesses and persons required to comply with this new rule.

Mr. Maxwell has also determined that each year of the first five years the new rule is in effect the public benefit anticipated as a result of this new rule will be a clear notification to applicants for examination of the new requirements of HB 1758. The public's health and safety will also benefit from better trained plumbers.

Comments on the proposal may be submitted within 30 days of publication in the *Texas Register,* to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

New §363.12 is proposed under and affects Title 8, Chapter 1301, Occupations Code ("Plumbing License Law"), as amended by HB 1758, 81st Legislature, Regular Session, 2009, §1301.251, and the rule it amends. Section 1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. Section 363.12 is also proposed under Texas Government Code §2006.002, as amended by the 80th Legislature, HB 3430, which requires an agency to perform an Economic Impact Statement and Regulatory Flexibility Analysis if a proposed rule could have an adverse economic impact on small businesses.

No other statute, article or code is affected by this proposed new rule.

§363.12. Training Programs for Journeyman Plumber and Tradesman Plumber-Limited License Applicants.

(a) Before an applicant may take an examination for a Tradesman Plumber-Limited license or Journeyman Plumber license, the applicant must complete classroom training provided by a board-approved instructor in a board-approved training program in the areas of health and safety, the latest versions of plumbing codes adopted by the Board, and water conservation for at least:

(1) 24 hours, if the applicant is applying to take a Tradesman Plumber-Limited License examination; or

(2) 48 hours, if the applicant is applying to take a Journeyman Plumber examination.

(b) The classroom training shall include the following Continuing Professional Education (CPE) classes as provided by §365.14 of this title (relating to Continuing Professional Education Programs):

(1) one six hour CPE class, if the applicant is applying for a Tradesman Plumber-Limited license; or

(2) two six hour CPE classes, if the applicant is applying for a Journeyman Plumber license.

(c) In addition to the CPE classes required by subsection (b)(1) and (2) of this section, applicants for a Tradesman Plumber-Limited License and Journeyman Plumber license must complete the OSHA 10-Hour Outreach Training, including Construction Mandatory Topics Review, as set forth in paragraphs (1) - (9) of this subsection:

(1) Introduction to OSHA (1 hour);

(2) OSHA Focus on Four Hazards (2 hours), including:

(A) Fall Protection;

(B) Electrical;

(C) Caught in Between; and

(D) Struck By;

(3) Personal Protective and Life Saving Equipment (1 hour);

(4) Health Hazards in Construction (1 hour), including:

(A) Hazard Communication; and

(B) Silica;

(5) Tools (1 hour), including:

(A) hand tools; and

(B) power tools;

(6) Excavations (1 hour);

(7) Stairways and Ladders (1 hour);

(8) Hazardous Materials (1 hour); and

(9) Introduction to Industrial Hygiene and Blood Borne Pathogens (1 hour).

(d) In addition to the CPE classes and OSHA training required by subsections (b)(1), (b)(2) and (c) of this section, applicants for a Tradesman Plumber-Limited License and Journeyman Plumber license must complete eight hours of classroom training, as set forth in paragraphs (1) - (7) of this subsection:

(1) two hours, to include:

(A) reading and understanding residential construction drawings;

(B) learning the basics of math for plumbing;

(C) drawing rough in and riser diagrams;

(2) one hour to review the International Residential Code chapter on Fuel Gas, including:

(A) definitions;

(B) pipe sizing and layout; and

(C) testing and inspections;

(3) one hour to review the International Residential Code chapter on General Plumbing Requirements, including:

(A) individual water supply and sewage disposal;

(B) structural and piping protection, including notching and boring;

(C) trenching and backfilling; and

(D) workmanship and waterproofing penetrations;

(E) listed, labeled and approved materials;

(4) one hour to review the International Residential Code chapters on Plumbing Fixtures and Water Heaters, including:

(A) the installation of plumbing fixtures and accessories;

(B) water heater installation and replacement, including hazards of improper installations; and

(C) water heater safety devices and alternative methods of existing installations not to code;

(5) one hour to review the International Residential Code chapter on Water Supply and Distribution, including:

(A) understanding and principals of backflow protection for potable water systems;

(B) water supply systems, including thermal expansion control and water hammer arrestors;

(C) water conservation and maximum flow for plumbing fixtures;

(D) sizing and pressures of potable water systems from the meter throughout distribution to fixture connections;

(E) materials and installation of potable water piping;

(F) demonstration of soldering and brazing according to B-828 standards;

(G) hangers, anchors and supports; and

(H) drinking water treatment units;

(6) one hour to review the International Residential Code chapters on Sanitary Drainage and Vents, including:

(A) materials and installation of drainage systems including proper grade and changes in direction of fittings;

(B) preparation of piping;

(C) standards for solvent cementing of pipe and fittings;

(D) cast iron piping and fittings;

(E) location and installation of cleanouts;

(F) sumps and ejectors sizing and installation;

(G) understanding the principals and physics of proper venting;

(H) installation of different types of venting systems; and

(I) improper connections and prohibited venting applications;

(7) one hour to review the International Residential Code chapter on Traps, including:

(A) design and prohibited traps;

(B) sizing and installation of traps and trap arms; and

(C) trap protection.

(e) In addition to the training required by subsections (b)(1), (b)(2) and (c) of this section, applicants for a Journeyman Plumber license must complete 18 hours of classroom training in certain chapters of the Uniform Plumbing Code, International Plumbing Code, or the International Fuel Gas Code (as appropriate); the Texas Accessibility Standards, the Americans with Disabilities Act; and water conservation, as set forth in paragraphs (1) - (12) of this subsection:

(1) 1 hour to review the chapters on General Regulations;

(2) 1 hour to review the chapters on Plumbing Fixtures and Fixture Fittings, including:

(A) general requirements and water conservation information for plumbing fixtures;

(B) commercial plumbing fixtures; and

(C) location and installation requirements for fixtures and fixture fittings;

(3) 2 hours to review the chapters on Water Heaters, including:

(A) general regulations for water heater installation and replacement, including hazards of improper installations;

(B) safety requirements for commercial water heaters; and

(C) different types of water heaters available, including installations;

(D) safety devices and alternative methods to bring existing installations into compliance with plumbing codes;

(4) 2 hours to review the chapters on Water Supply and Distribution, including:

(A) installation of potable water systems;

(B) pipe sizing of water supply and distribution;

(5) 2 hours to review the chapters on Sanitary Drainage, including:

(A) understanding commercial plumbing; and

(B) pipe sizing of sanitary waste;

(6) 1 hour to review the chapters on Indirect Wastes, including:

(A) applications accepted for indirect waste systems, both air-gap and air-break; and

(B) understanding the reason for indirect waste systems;

(7) 2 hours to review the chapters on Vents, including:

(A) physics and importance of proper venting;

(B) different venting methods, including vent termination;

(C) special venting for island fixtures, and combination waste and vent systems; and

(D) pipe sizing of vents;

(8) 1 hour to review the chapters on Traps and Interceptors, including:

(A) physics and importance of trap protection;

(B) grease interceptor design, installation and maintenance according to Plumbing Drainage Institute; and

(C) different types of interceptors and applications according to code;

(9) 1 hour to review the chapters on Storm Drainage, including:

(A) basic design, materials and installation of storm water systems;

(B) hazards of improper installations; and

(C) testing procedures for storm drainage systems;

(10) 2 hours to review the chapters on Fuel Gas Piping, including:

(A) hazards of improperly designed or installed fuel gas piping and appliances;

(B) approved materials and methods, including pipe and fittings; and

(C) combustion air requirements;

(11) 1 hour to review the basic installation of handicapped plumbing fixtures for commercial projects, as required by the Texas Accessibility Standards and the Americans with Disabilities Act; and

(12) 2 hours to review new technology which promotes water and energy conservation, including rain water harvesting, solar energy, and water smart applications.

(f) The Board will approve only Course Providers and Course Instructors who are approved to provide and instruct Continuing Professional Education (CPE) courses, under §365.14 of this title, to provide and instruct the classroom training required by this section, with the following exception:

(1) an instructor must be certified by the Occupational Safety and Health Administration to provide the training required under subsection (c) of this section; and

(2) any person who is not approved to teach CPE under §365.14 of this title, but is certified by the Occupational Safety and Health Administration, may provide training through a Course Provider, for the OSHA training course referenced in subsection (c) of this section.

(g) Course Providers and Course Instructors may be approved to provide the classroom training required under this section without submitting a separate application in addition to the application required to be approved to provide and instruct CPE, under §365.14 of this title.

(1) Any Course Provider or Course Instructor whose approval to provide or instruct CPE courses under §365.14 of this title is suspended or revoked for any reason, is not approved to provide or instruct the classroom training required under this section.

(2) Course Providers and Course Instructors shall adhere to the instruction criteria in subsections (b), (c) and (d) of this section, and ensure that only students who receive the specified number of contact hours of instruction (excluding any time spent on breaks from instruction) receive credit for completing the training required by this section.

(3) Course Providers or Course instructors shall provide notice of intent to conduct training required by this section, in the same manner required by §365.14(b)(10) of this title.

(4) Course Instructors shall abide by the same standards of conduct described in §365.14(c) of this title, when providing the training required by this section.

(h) The training required by this section may be provided in increments, as appropriate, and the Course Provider or Course Instructor shall provide a certificate of completion to the student for each increment completed.

(1) The certificate of completion shall state:

(A) the names of the Course Provider and Course Instructor;

(B) the name and registration or license number of the student;

(C) the specific instruction and number of hours completed; and

(D) the date that the increment of instruction was completed.

(2) The Course Provider shall maintain a record of the information contained on each certificate of completion for at least six years.

(i) The applicant for examination is responsible for the safe keeping of each original certificate of completion earned by the applicant, until such time that the applicant:

(1) has completed the training required under this section;

(2) has met all other requirements under §363.1 of this chapter (relating to Qualifications), to qualify to take a Tradesman Plumber-Limited or Journeyman Plumber examination; and

(3) submits the original certificates of completion along with the appropriate examination application and other required documentation to the Board.

(j) Providing false certificates of completion or any other false information to the Board may result in denial of the applicant's examination application and may result in additional disciplinary action, as provided by the Plumbing License Law, Board Rules or other laws of this state.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904748
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 936-5224

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PART 19. POLYGRAPH EXAMINERS BOARD

CHAPTER 391. POLYGRAPH EXAMINER INTERNSHIP

22 TAC §§391.1 - 391.10

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Licensing and Regulation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Licensing and Regulation ("Department") proposes the repeal of existing rules at 22 Texas Administrative Code ("TAC"), Chapter 391, §§391.1 - 391.10 regarding polygraph examiner internship.

Acts of the 81st, Legislature, Regular Session, 2009, Senate Bill 1005 ("SB 1005") transferred the regulation of polygraph examiners from the Polygraph Examiners Board to the Texas Department of Licensing and Regulation effective May 13, 2009,

amended Texas Occupations Code, Chapter 1703 relating to the regulation of polygraph examiners, and abolished the Polygraph Examiners Board. Therefore, the Department proposes to repeal the Polygraph Examiners Board rules in order to reorganize and clarify the rules regulating polygraph examiners under Title 16, Texas Administrative Code, relating to the rules of the Texas Department of Licensing and Regulation. The Department in a separate rulemaking action is proposing new rules at 16 TAC Chapter 88, that will replace the rules affected by the repeal.

William H. Kuntz, Jr., Executive Director has determined that for the first five-year period the proposed repeal is in effect there will be no cost to state or local government as a result of enforcing or administering the repeal.

Mr. Kuntz also has determined that for each year of the first-year period the proposed repeal is in effect, the public benefit will be reduced confusion because the Polygraph Examiners Board's existing rules contain references to the Polygraph Examiners Board that is obsolete.

There will be no adverse economic effect on small or micro-business and to persons who are required to comply with the proposal.

Since the agency has determined that the repeal will have no adverse economic effect on small business, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002 is not required.

Comments on the repeal may be submitted to Caroline Jackson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The repeal is proposed under Senate Bill 1005, Acts of the 81st Texas Legislature and Texas Occupations Code, Chapters 51 and 1703, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapters 51 and 1703. No other statutes, articles, or codes are affected by the repeal.

§391.1. Authority.

§391.2. Procedure and Qualifications.

§391.3. Internship Training Schedule.

§391.4. State Examinations for Polygraph Examiners License.

§391.5. Supervision and Internship Review.

§391.6. Intern Sponsor Reporting.

§391.7. Appearance Before the Board.

§391.8. Applicant With Out-of-State License.

§391.9. Intern Licensure Requirements for Preceptor Trainees.

§391.10. Procedures and Qualifications of Current and Former Governmental Polygraph Examiners.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904751

William H. Kuntz, Jr.

Executive Director, Texas Department of Licensing and Regulation

Polygraph Examiners Board

Earliest possible date of adoption: November 29, 2009

For further information, please call: (512) 463-7348

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CHAPTER 393. GENERAL

22 TAC §§393.1, 393.3 - 393.7, 393.9 - 393.11

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Licensing and Regulation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Licensing and Regulation ("Department") proposes the repeal of existing rules at 22 Texas Administrative Code ("TAC"), Chapter 393, §§393.1, 393.3 - 393.7, and 393.9 - 393.11, regarding general rules of the polygraph examiners board.

Acts of the 81st, Legislature, Regular Session, 2009, Senate Bill 1005 ("SB 1005") transferred the regulation of polygraph examiners from the Polygraph Examiners Board to the Texas Department of Licensing and Regulation effective May 13, 2009, amended Texas Occupations Code, Chapter 1703 relating to the regulation of polygraph examiners, and abolished the Polygraph Examiners Board. Therefore, the Department proposes to repeal the Polygraph Examiners Board rules in order to reorganize and clarify the rules regulating polygraph examiners under Title 16, Texas Administrative Code, relating to the rules of the Texas Department of Licensing and Regulation. The Department in a separate rulemaking action is proposing new rules at 16 TAC Chapter 88, that will replace the rules affected by the repeal.

William H. Kuntz, Jr., Executive Director has determined that for the first five-year period the proposed repeal is in effect there will be no cost to state or local government as a result of enforcing or administering the repeal.

Mr. Kuntz also has determined that for each year of the first-year period the proposed repeal is in effect, the public benefit will be reduced confusion because the Polygraph Examiners Boards existing rules contain references to the Polygraph Examiners Board that is obsolete.

There will be no adverse economic effect on small or micro-business and to persons who are required to comply with the proposal.

Since the agency has determined that the repeal will have no adverse economic effect on small business, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002 is not required.

Comments on the repeal may be submitted to Caroline Jackson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The repeal is proposed under Senate Bill 1005, Acts of the 81st Texas Legislature and Texas Occupations Code, Chapters 51

and 1703, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapters 51 and 1703. No other statutes, articles, or codes are affected by the repeal.

§393.1. Meetings.

§393.3. Board Promulgated Regulations.

§393.4. Official Publication of Official State Board Activities.

§393.5. Acts in Board's Name.

§393.6. Calling Board Meetings.

§393.7. Polygraph Examination.

§393.9. Bonds and Insurance.

§393.10. Suspension of License for Failure to Pay Child Support.

§393.11. Licensing of Guaranteed Student Loan Defaulters.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904752

William H. Kuntz, Jr.

Executive Director, Texas Department of Licensing and Regulation

Polygraph Examiners Board

Earliest possible date of adoption: November 29, 2009

For further information, please call: (512) 463-7348

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CHAPTER 395. CODE OF OPERATING PROCEDURE OF POLYGRAPH EXAMINERS

22 TAC §§395.1 - 395.6, 395.8 - 395.11, 395.13 - 395.16, 395.18

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Licensing and Regulation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Licensing and Regulation ("Department") proposes the repeal of existing rules at 22 Texas Administrative Code ("TAC"), Chapter 395, §§395.1 - 395.6, 395.8 - 395.11, 395.13 - 395.16, and 395.18 regarding code of operating procedure of polygraph examiners.

Acts of the 81st, Legislature, Regular Session, 2009, Senate Bill 1005 ("SB 1005") transferred the regulation of polygraph examiners from the Polygraph Examiners Board to the Texas Department of Licensing and Regulation effective May 13, 2009, amended Texas Occupations Code, Chapter 1703 relating to the regulation of polygraph examiners, and abolished the Polygraph Examiners Board. Therefore, the Department proposes to repeal the Polygraph Examiners Board rules in order to reorganize and clarify the rules regulating polygraph examiners under Title 16, Texas Administrative Code, relating to the rules of the Texas Department of Licensing and Regulation. The Department in a separate rulemaking action is proposing new rules at 16 TAC Chapter 88, that will replace the rules affected by the repeal.

William H. Kuntz, Jr., Executive Director has determined that for the first five-year period the proposed repeal is in effect there will be no cost to state or local government as a result of enforcing or administering the repeal.

Mr. Kuntz also has determined that for each year of the first-year period the proposed repeal is in effect, the public benefit will be reduced confusion because the Polygraph Examiners Board's existing rules contain references to the Polygraph Examiners Board that is obsolete.

There will be no adverse economic effect on small or micro-business and to persons who are required to comply with the proposal.

Since the agency has determined that the repeal will have no adverse economic effect on small business, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002 is not required.

Comments on the repeal may be submitted to Caroline Jackson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The repeal is proposed under Senate Bill 1005, Acts of the 81st Texas Legislature and Texas Occupations Code, Chapters 51 and 1703, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapters 51 and 1703. No other statutes, articles, or codes are affected by the repeal.

§395.1. Authority.

§395.2. Marking Questions and Answers.

§395.3. No Reproduction of Licenses.

§395.4. Filing.

§395.5. Reports.

§395.6. No Interrogation of Sexual Behavior.

§395.8. Questions Asked Two Separate Times.

§395.9. Unfit for Examination.

§395.10. Examination Results.

§395.11. Response Intervals.

§395.13. Expiration of Licenses.

§395.14. No Texas Address.

§395.15. Authority to Work in the United States.

§395.16. Unauthorized Examination.

§395.18. No Interrogation on Political, Racial, or Religious Beliefs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904753

William H. Kuntz, Jr.
Executive Director, Texas Department of Licensing and Regulation
Polygraph Examiners Board
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 463-7348

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CHAPTER 397. GENERAL RULES OF PRACTICE AND PROCEDURE

22 TAC §§397.1 - 397.33

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Licensing and Regulation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Licensing and Regulation ("Department") proposes the repeal of existing rules at 22 Texas Administrative Code ("TAC"), Chapter 397, §§397.1 - 397.33 regarding general rules of practice and procedure of polygraph examiners.

Acts of the 81st, Legislature, Regular Session, 2009, Senate Bill 1005 ("SB 1005") transferred the regulation of polygraph examiners from the Polygraph Examiners Board to the Texas Department of Licensing and Regulation effective May 13, 2009, amended Texas Occupations Code, Chapter 1703 relating to the regulation of polygraph examiners, and abolished the Polygraph Examiners Board. Therefore, the Department proposes to repeal the Polygraph Examiners Board rules in order to reorganize and clarify the rules regulating polygraph examiners under Title 16, Texas Administrative Code, relating to the rules of the Texas Department of Licensing and Regulation. The Department in a separate rulemaking action is proposing new rules at 16 TAC Chapter 88, that will replace the rules affected by the repeal.

William H. Kuntz, Jr., Executive Director has determined that for the first five-year period the proposed repeal is in effect there will be no cost to state or local government as a result of enforcing or administering the repeal.

Mr. Kuntz also has determined that for each year of the first-year period the proposed repeal is in effect, the public benefit will be reduced confusion because the Polygraph Examiners Board's existing rules contain references to the Polygraph Examiners Board that is obsolete.

There will be no adverse economic effect on small or micro-business and to persons who are required to comply with the proposal.

Since the agency has determined that the repeal will have no adverse economic effect on small business, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002 is not required.

Comments on the repeal may be submitted to Caroline Jackson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The repeal is proposed under Senate Bill 1005, Acts of the 81st Texas Legislature and Texas Occupations Code, Chapters 51 and 1703, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapters 51 and 1703. No other statutes, articles, or codes are affected by the repeal.

§397.1. Definitions.

§397.2. Applicability of Chapter.

§397.3. Complaints.

§397.4. Notice of Allegations and Opportunity to Respond.

§397.5. Complaint Investigations.

§397.6. Respondents Denied Licensure.

§397.7. Complaint Officers.

§397.8. Informal Conference.

§397.9. Informal Disposition of Complaints.

§397.10. Classification of Parties and Pleadings.

§397.11. Appearances Personally or by Representative.

§397.12. Conduct and Decorum.

§397.13. Agreements To Be in Writing.

§397.14. Computation of Time.

§397.15. State Office of Administrative Hearings.

§397.16. Availability of Administrative Hearing.

§397.17. Notice of Administrative Hearing.

§397.18. Answer or Response.

§397.19. Location of Administrative Hearings.

§397.20. Filing of Documents.

§397.21. Form and Content of Pleadings.

§397.22. Exhibits.

§397.23. Amendments.

§397.24. Service.

§397.25. Texas Rules of Civil Procedure.

§397.26. Prefiled Testimony.

§397.27. Limitations on the Number of Witnesses in Administrative Proceedings.

§397.28. Failure to Attend Hearing; Default Judgement.

§397.29. Dismissal Without Hearing.
§397.30. Proposals for Decision.
§397.31. Form and Content of Briefs, Exceptions, and Replies.
§397.32. Final Decisions and Orders.
§397.33. Reporters and Transcript.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

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William H. Kuntz, Jr.
Executive Director, Texas Department of Licensing and Regulation
Polygraph Examiners Board
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 463-7348

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CHAPTER 401. GRIEVANCE POLICY

22 TAC §401.1

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Licensing and Regulation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Licensing and Regulation ("Department") proposes the repeal of existing rules at 22 Texas Administrative Code ("TAC"), Chapter 401, §401.1 regarding the grievance policy of the polygraph examiners board.

Acts of the 81st, Legislature, Regular Session, 2009, Senate Bill 1005 ("SB 1005") transferred the regulation of polygraph examiners from the Polygraph Examiners Board to the Texas Department of Licensing and Regulation effective May 13, 2009, amended Texas Occupations Code, Chapter 1703 relating to the regulation of polygraph examiners, and abolished the Polygraph Examiners Board. Therefore, the Department proposes to repeal the Polygraph Examiners Board rules in order to reorganize and clarify the rules regulating polygraph examiners under Title 16, Texas Administrative Code, relating to the rules of the Texas Department of Licensing and Regulation. The Department in a separate rulemaking action is proposing new rules at 16 TAC Chapter 88, that will replace the rules affected by the repeal.

William H. Kuntz, Jr., Executive Director has determined that for the first five-year period the proposed repeal is in effect there will be no cost to state or local government as a result of enforcing or administering the repeal.

Mr. Kuntz also has determined that for each year of the first-year period the proposed repeal is in effect, the public benefit will be reduced confusion because the Polygraph Examiners Board's existing rules contain references to the Polygraph Examiners Board that is obsolete.

There will be no adverse economic effect on small or micro-business and to persons who are required to comply with the proposal.

Since the agency has determined that the repeal will have no adverse economic effect on small business, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002 is not required.

Comments on the repeal may be submitted to Caroline Jackson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The repeal is proposed under Senate Bill 1005, Acts of the 81st Texas Legislature and Texas Occupations Code, Chapters 51 and 1703, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapters 51 and 1703. No other statutes, articles, or codes are affected by the repeal.

§401.1. Grievance Policy.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

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William H. Kuntz, Jr.
Executive Director, Texas Department of Licensing and Regulation
Polygraph Examiners Board
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 463-7348

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 217. MILK AND DAIRY

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes the repeal of §§217.1 - 217.3, 217.61 - 217.71, 217.81 - 217.85, 217.91, and 217.92 and new §§217.1, 217.2, 217.41 - 217.51, 217.61 - 217.65, 217.71 - 217.81, 217.91, and 217.92 concerning the milk and dairy program.

BACKGROUND AND PURPOSE

The repeal and new sections are a result of Senate Bill (SB) 1714, 80th Legislature, Regular Session, 2007, which amended Health and Safety Code, Chapter 435. The permit and inspection fees are mandated by Health and Safety Code, §435.009(b). In addition, costs to upgrade facilities and equipment are also required by state statute and federal regulations. SB 1714 amends Health and Safety Code, §435.003(a), to require for the first time that all non-Grade A dairy products be handled and produced in accordance with Health and Safety Code, Chapter 435 standards. Dairy products regulated under Health and Safety Code, Chapter 435, must comply with federal standards in §435.003(b).

Federal standards include the Grade A Pasteurized Milk Ordinance, which is adopted by the Food and Drug Administration.

The proposed new rules update language for Grade Specifications and Requirements for Milk (proposed new Subchapter A), Rules for the Manufacture of Frozen Desserts (proposed new Subchapter C), Bulk Milk Regulations (proposed new Subchapter D), and Permits, Fees, and Enforcement (proposed new Subchapter F). New language for Dairy Products and Milk for Manufacturing Purposes (proposed new Subchapter E) implements SB 1714. Subchapter B, §§217.21 - 217.33 of Chapter 217, relating to Grade A Raw for Retail Milk and Milk Products, is not being revised at this time and, therefore, remains in effect as is currently published in the Texas Administrative Code.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 217.1 - 217.3, 217.61 - 217.71, 217.81 - 217.85, 217.91, and 217.92 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Throughout new Subchapters A and C - F of Chapter 217: sections are reformatted and/or renumbered to meet Texas Register format; references to "§403(h)(3)" are changed to "§343(h)(3)" to correct the citation of the Federal Food, Drug and Cosmetic Act; all references to "Grade A Condensed and Dry Milk Ordinance," "Imitation frozen dessert" and "Imitation frozen dessert mix" are deleted because the definitions are obsolete; all references to "PMO" or "Pasteurized Milk Ordinance" or "U.S. Public Health Service Grade A Pasteurized Milk Ordinance" are changed to, "Grade A Pasteurized Milk Ordinance" for consistency; and other minor grammatical changes are made for clarification.

All sections of new Subchapters A and C - F of Chapter 217 are renumbered due to the addition of new §§217.71 - 217.81.

The rules in §§217.1 - 217.3 are being repealed and proposed as new §217.1 and §217.2, which update, add, and delete definitions and provides for the continued adoption of the requirements for the Grade A Pasteurized Milk Ordinance.

Concerning new §217.1, the following definitions are revised to be consistent with terms used throughout the chapter: "Bulk milk hauler" is revised to read, "Bulk milk hauler/sampler;" "Concentrated milk" is revised to read, "Concentrated (condensed) milk;" "Concentrated milk products" is revised to read, "Concentrated (condensed) milk products;" Frozen low fat yogurt" is revised to read, "Frozen low fat yogurt and mix;" and "Frozen low fat yogurt mix" is revised to read, "Frozen low fat yogurt dry mix."

Concerning new §217.1, the following definitions are added and subsequent definitions were renumbered: "Dairy product manufacturer" and "Federal Food Drug and Cosmetic Act (FFDCA)."

Concerning new §217.1, the following definitions are deleted because they are obsolete and subsequent definitions were renumbered: "Grade A Condensed and Dry Milk Ordinance" and "Imitation frozen dessert mix."

Regarding new §217.2, the department name is updated and the current physical address is added to inform stakeholders where they may obtain copies of referenced documents.

The rules in §§217.61 - 217.71 are being repealed and proposed as new §§217.41 - 217.51 which update rules for the Manufacture of Frozen Desserts. References to imitation frozen desserts mix and imitation frozen desserts were deleted throughout the subchapter because the products are obsolete.

New §217.44 changes the inspection interval each frozen desserts plant must undergo following the issuance of a permit from "once every six months" to "once every three months" to be consistent with national regulatory standards.

New §217.45(a) specifies the frequency of the examination and standards for frozen desserts to be collected during any consecutive six months. At least four samples of raw milk intended for use in the manufacture of frozen desserts shall be collected and examined by the department. "Raw cream" and "raw milk products" are removed from the list of products that must be sampled.

New §217.45(e) adds "provided, that nothing shall be construed as barring any other process found equivalent to pasteurization for milk and milk products, which has been recognized by the United States Food and Drug Administration (FDA) as provided in §343(h)(3) of the Federal Food, Drug and Cosmetic Act. Only such FDA recognized processes and no other shall be considered by the department." to clarify that only FDA-recognized processes will be considered by the department.

New §217.46(e)(1)(I) adds "The milk plant, frozen dessert plant, containers, utensils, and equipment shall be used for no purpose other than the processing of milk, cream, milk products, mix, and frozen desserts, and the operation incident thereto, except as may be approved in writing by the department." to clarify that department approval shall be in writing.

New §217.46(e)(6) states that written permission from the department shall be obtained for milk or milk products to be received from a transport tank that appears to be damaged, dirty, or does not have a cleaning tag attached.

New §217.46(l) is revised to include specific frequencies and requirements for cleaning of multi-use containers and utensils and to require the necessary documentation be submitted in writing to the department for review and approval.

New §217.46(p)(1) adds a heating and holding temperature of 180 degrees Fahrenheit for not less than 15 seconds to be consistent with national regulatory standards.

New §217.46(p)(3) adds "Nothing shall be construed as barring any other process found equivalent to pasteurization for milk and milk products, which has been recognized by the United States Food and Drug Administration (FDA) as provided in §343(h)(3) of the Federal Food, Drug and Cosmetic Act. Only such FDA recognized processes and no other shall be considered by the department." to clarify that only FDA-recognized processes will be considered by the department.

New §217.46(y) adds new raw product storage requirements for the sanitation standards of frozen desserts plants to be consistent with national regulatory standards.

New §217.51(c) clarifies that adequate medical examination of an infected person or potentially infected person shall be performed before returning to frozen dessert handling.

The rules in §§217.81 - 217.85 are being repealed and proposed as new §§217.61 - 217.65, update rules for Storage and Transportation of Bulk Milk.

New §217.61(a)(2) redefines the minimum passing score for examination for bulk milk hauler/sampler certifications and adds new specifications for the examination criteria.

New §217.61(a)(3)(B) specifies that acceptance of the training program will be indicated in a letter issued by the department.

New §217.61(a)(5) adds language to allow official milk samplers, and bulk milk haulers/samplers the option to be evaluated by the authorized Regulatory Agency of another state.

New §217.61(b)(1) adds a reference to §217.2 of this title, which specifies the procedure and handling requirements for bulk milk pickup tankers.

New §217.61(b)(2) is changed to require that a copy of the load manifest be provided and adds that the hauler/sampler name and driver's license number be provided for each route pickup load.

New §217.62(d) adds a requirement that farm bulk milk tanks shall comply with the Grade A Pasteurized Milk Ordinance.

New §217.63(a) adds language to allow official milk samplers, and bulk milk haulers/samplers the option to be permitted by the authorized Regulatory Agency of another state and clarifies that failure to obtain a permit may result in the milk tank truck and its contents being immediately removed from Grade A or food use.

New §217.63(b) is revised to read, "All vehicles and milk tank trucks containing milk or milk products shall be legibly marked with the name and address of the milk plant or hauler in possession of the contents. The permit sticker issued by the department shall be placed near the outlet valve of the tanker truck or trailer." to be consistent with national regulatory standards.

New §217.63(c) is changed to clarify that the owner or manager of the milk transportation company report to the department verbally or in writing within 10 days any tanks taken out of service or damaged.

New §217.64(a)(4) specifies that agitation of milk in the transport tank should be done for a minimum of 15 minutes prior to obtaining samples; clarifies that samples must be collected only by a certified milk sampler; and allows the department to approve alternative procedures to achieve adequate agitation.

New §217.64(b)(1) adds "All milk tank trucks that transport milk and milk products as permitted by the department, shall be washed and sanitized at a permitted milk plant, receiving station, transfer station, or milk tank truck cleaning facility." to be consistent with national regulatory standards.

New §217.64(b)(3)(F) corrects the term "pressure recorder" with "pressure indicator."

New §217.64(b)(5) clarifies the ability to pick up multiple loads in a milk tank truck within a 24-hour period as long as the milk tank truck is washed after each day's use.

New §217.64(b)(6) revises the time interval to re-sanitize a milk tank truck and appurtenances to be consistent with national regulatory standards.

New §217.64(b)(7) changes the standards for the accountability of the cleaning and sanitizing tag for milk tank trucks to maintain equivalent national regulatory standards.

New §217.65 adds a reference to §217.2 of this title, which specifies the duties and responsibilities of the bulk milk hauler/sampler.

New §§217.71 - 217.81 provide new rules for the manufacture of non-Grade A dairy products and add requirements for dairy products and milk for manufacturing purposes as a result of SB 1714 which amended Health and Safety Code, Chapter 435. The dairy products include instant nonfat dry milk, nonfat dry milk, dry whole milk, dry buttermilk, dry whey, and other dry milk products; butter and related products; cheese, pasteurized cheese and related products; and evaporated or condensed milk products.

The rules in Subchapter E, §217.91 and §217.92 are being repealed and proposed as new Subchapter F, §217.91 and §217.92 which update rules for issuance of licenses, collection of fees, and enforcement provisions of Chapter 217 relating to Milk and Dairy. New permit and inspection fees for non-Grade A dairy products have been added to new §217.91.

New §217.91(a) clarifies that the term of the permit/license is for two years required by Health and Safety Code, §435.009(d).

New §217.91(a)(1) adds clarifying language that approval by the department is based on an inspection prior to the issuance of a permit.

New §217.91(a)(3) adds language to include that past due or late inspection fees shall be paid in order for a permit to be issued.

New §217.91(b) updates the department name and adds the current physical address is to inform stakeholders where they may obtain copies of referenced documents.

New §217.91(c)(1) updates all fees to reflect the new two-year permit term as required by Health and Safety Code, §435.009, and modifies language to apply fees to facilities and operations located outside Texas to reflect the application of permit and license fees for those dairy products regulated under new §§217.71 - 217.81.

New §217.91(d) updates the deadline for submitting a permit/license renewal application to reflect the new two-year permit term as required by Health and Safety Code, §435.009.

New §217.91(c)(1) and (h)(3) add permit and inspection fees for those dairy products regulated under new §§217.71 - 217.81.

FISCAL NOTE

Susan E. Tennyson, Section Director, Environmental and Consumer Safety Section, has determined that for each year of the first five years the sections are in effect, there will be fiscal implications to the state as a result of enforcing or administering the sections as proposed. The effect on state government will be an increase in revenue to the state of approximately $47,380 the first year, $25,380 the second year, $67,380 the third year, $45,380 the fourth year, and $87,380 the fifth year due to the new two-year license requirement and inspection fees on dairy products. Costs to the state are estimated to be approximately $40,880 the first year, $31,380 for the second year, $31,880 for the third year and $32,380 for each of the following two years to conduct inspections and collect samples at the dairy products facilities that will now be required to comply with the new dairy products regulations. Implementation of the proposed sections will not result in any fiscal implications for local governments.

SMALL AND MICRO-BUSINESS ECONOMIC IMPACT ANALYSIS

Ms. Tennyson has also determined that there are anticipated economic costs to persons who are manufacturers of non-Grade A dairy products. These manufacturers include large, small and micro-businesses. Most manufacturers of non-Grade A dairy products (e.g., cheese and butter) are currently licensed as food manufacturers and pay approximately $104 to $150 for a two-year license. Under the proposed rules, all non-Grade A dairy

manufacturers will pay $800 for a two-year permit. They will also pay an inspection fee of at least $60 per year based on volume of sales. Of the approximately 40 facilities that will now be required to comply with these rules, approximately 30 of the facilities would be considered small and micro-businesses. These small and micro-businesses will pay the same permit fees as the larger manufacturers because the fees are required by statute. Their inspection fees based on volume of sales are anticipated to be smaller because their sales are anticipated to be smaller. In addition, some of the small and micro-businesses that are non-Grade A dairy manufacturers will incur costs ranging from $10,000 to $25,000 to bring their facility and equipment into compliance with the mandatory national standards incorporated in the proposed new §§217.71 - 217.81. The department believes the larger manufacturers already have complying facilities and equipment and will, therefore, not incur these costs. There is no anticipated impact on local employment.

REGULATORY FLEXIBILITY ANALYSIS

Of the approximately 40 facilities that will now be required to comply with this rule, approximately 30 of the facilities would be considered small and micro-businesses that make non-Grade A products such as cheese and butter. These businesses will incur increased costs because of increased permit fees, inspection fees and costs to bring their facility and equipment into compliance with national standards. The permit and inspection fees are mandated by SB 1714 in the amendments to Health and Safety Code, §435.009(b). Consequently, any variance from these legislative rates would not be consistent with health, safety and environmental welfare and no alternative regulatory methods have been considered.

In addition, costs to upgrade facilities and equipment are also required by state statute and federal regulations. SB 1714 amends Health and Safety Code, §435.003(a), to require for the first time that all non-Grade A dairy products be handled and produced in accordance with Chapter 435 standards. Dairy products regulated under Health and Safety Code, Chapter 435, must comply with federal standards in §435.003(b). Federal standards include the Grade A Pasteurized Milk Ordinance, which is adopted by the Food and Drug Administration. In order to comply with the federal Grade A Pasteurized Milk Ordinance standards, upgrades that cost a minimum of $10,000 are now required. Consequently, any variance from these federal Grade A Pasteurized Milk Ordinance standards would not be consistent with health, safety and environmental welfare and no alternative regulatory methods have been considered. The rules, however, do not require companies to own or purchase the equipment. They may rent or share equipment as long as they remain in compliance with the federal Grade A Pasteurized Milk Ordinance standards incorporated in the Texas rules.

PUBLIC BENEFIT

In addition, Ms. Tennyson has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to enhance the safety of dairy products manufactured in Texas by establishing a program in which all dairy products are regulated in a consistent manner that is based on national standards.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Gene Wright, Environmental and Consumer Safety Section, Division of Regulatory Services, Department of State Health Services, Mail Code 1987, P.O. Box 149347, Austin, Texas 78714-9347, (512) 834-6770, extension 2570, or by email to MilkRules@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

PUBLIC HEARING

A public hearing to receive comments on the proposal will be scheduled after publication of this proposal in the *Texas Register*. The meeting date and location will be posted on the Milk and Dairy Group website (www.dshs.state.tx.us/milk/rules.shtm). Please contact Gene Wright at (512) 834-6770, extension 2570, or Gene.Wright@dshs.state.tx.us if you have questions.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

SUBCHAPTER A. GRADE SPECIFICATIONS AND REQUIREMENTS FOR MILK

25 TAC §§217.1 - 217.3

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §12.0111, which requires the department to charge fees for issuing or renewing a license sufficient to recover costs; §12.0112, which requires the term of each license issued to be two years; Health and Safety Code, §§431.241, 435.009(c), and 440.006, which provide the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapters 431, 435, and 440; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The repeals affect the Health and Safety Code, Chapters 12, 431, 435, 440, and 1001; and Government Code, Chapters 531 and 2001.

§217.1. Definitions.

§217.2. Grade A Pasteurized Milk Ordinance.

§217.3. Grade A Condensed and Dry Milk Ordinance.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 16, 2009.

TRD-200904663
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. RULES FOR THE MANUFACTURE OF FROZEN DESSERTS

25 TAC §§217.61 - 217.71

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §12.0111, which requires the department to charge fees for issuing or renewing a license sufficient to recover costs; §12.0112, which requires the term of each license issued to be two years; Health and Safety Code, §§431.241, 435.009(c), and 440.006, which provide the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapters 431, 435, and 440; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The repeals affect the Health and Safety Code, Chapters 12, 431, 435, 440, and 1001; and Government Code, Chapters 531 and 2001.

§217.61. Introduction.

§217.62. Permits.

§217.63. Labeling.

§217.64. Inspection of Frozen Desserts or Imitation Frozen Desserts Plants.

§217.65. Examination and Standards for Frozen Desserts.

§217.66. Sanitation Standards for Frozen Desserts Plants.

§217.67. Frozen Desserts Which May Be Sold.

§217.68. Transferring and Dispensing Frozen Desserts.

§217.69. Mix and Frozen Desserts from Points Beyond the Limits of Routine Inspection.

§217.70. Future Frozen Desserts Plants.

§217.71. Procedure When Infection Is Suspected.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
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SUBCHAPTER D. BULK MILK REGULATIONS

25 TAC §§217.81 - 217.85

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §12.0111, which requires the department to charge fees for issuing or renewing a license sufficient to recover costs; §12.0112, which requires the term of each license issued to be two years; Health and Safety Code, §§431.241, 435.009(c), and 440.006, which provide the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapters 431, 435, and 440; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The repeals affect the Health and Safety Code, Chapters 12, 431, 435, 440, and 1001; and Government Code, Chapters 531 and 2001.

§217.81. Bulk Milk Hauler Qualifications and Requirements.

§217.82. Bulk Milk Holding Tanks.

§217.83. Milk Tank Trucks.

§217.84. Unloading Stations and Milk Tank Truck Cleaning Facilities.

§217.85. Training Outline and Responsibilities of the Bulk Milk Hauler/Sampler.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
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SUBCHAPTER E. PERMITS, FEES AND ENFORCEMENT

25 TAC §217.91, §217.92

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §12.0111, which requires the department to charge fees for issuing or renewing a license sufficient to recover costs; §12.0112, which requires the term of each license issued to be two years; Health and Safety Code, §§431.241, 435.009(c), and 440.006, which provide the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapters 431, 435, and 440; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The repeals affect the Health and Safety Code, Chapters 12, 431, 435, 440, and 1001; and Government Code, Chapters 531 and 2001.

§217.91. Milk Facilities and Operations Permit and Frozen Dessert License Procedures.

§217.92. Enforcement.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
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SUBCHAPTER A. GRADE SPECIFICATIONS AND REQUIREMENTS FOR MILK

25 TAC §217.1, §217.2

STATUTORY AUTHORITY

The new rules are authorized by Health and Safety Code, §12.0111, which requires the department to charge fees for issuing or renewing a license sufficient to recover costs; §12.0112, which requires the term of each license issued to be two years; Health and Safety Code, §§431.241, 435.009(c), and 440.006, which provide the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapters 431, 435, and 440; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The new rules affect the Health and Safety Code, Chapters 12, 431, 435, 440, and 1001; and Government Code, Chapters 531 and 2001.

§217.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Acidified milk--The food produced by souring cream, milk, partially skimmed milk, or skim milk or any combination, with acetic acid, adipic acid, citric acid, fumaric acid, glucono-delta-lactone, hydrochloric acid, lactic acid, malic acid, phosphoric acid, succinic acid, or tartaric acid, with or without the addition of characterizing microbial organisms. Acidified milk is further defined in Title 21, Code of Federal Regulations (CFR), §131.111.

(2) Acidified sour cream--The product resulting from the souring of pasteurized cream with safe and suitable acidifiers, with or without addition of lactic acid producing bacteria, and as further defined in Title 21, CFR, §131.162.

(3) Adulterated milk and milk products--Any milk or milk product shall be deemed to be adulterated if:

(A) it bears or contains any poisonous or deleterious substance in a quantity which may render it injurious to health;

(B) it bears or contains any added poisonous or deleterious substance for which no safe tolerance has been established by State or Federal regulation, or in excess of such tolerance if one has been established;

(C) it consists, in whole or in part, of any substance unfit for human consumption;

(D) it has been produced, prepared, packed, or held under unsanitary conditions;

(E) its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;

(F) any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight or reduce its quality or strength or make it appear better or of greater value than it is; or

(G) any milk or milk product shall be deemed to be adulterated if one or more of the conditions described in the Federal Food, Drug and Cosmetic Act, §402, as amended (Title 21 U.S.C., Part 342) exist.

(4) Aseptic processing--The term "aseptic processing," when used to describe a milk product, means that the product has been subjected to sufficient heat processing, and packaged in a hermetically sealed container, to conform to the applicable requirements of Title

21, CFR, Part 113 and maintain the commercial sterility of the product under normal non-refrigerated conditions.

(5) Aseptically processed milk and milk products--Products hermetically sealed in a container and so thermally processed in conformance with Title 21, CFR, Part 113 and the provisions of the "Grade A Pasteurized Milk Ordinance" which is adopted by reference in §217.2 of this title (relating to Grade A Pasteurized Milk Ordinance), so as to render the product free of microorganisms capable of reproducing in the product under normal nonrefrigeration conditions of storage and distribution. The product shall be free of viable microorganisms (including spores) of public health significance.

(6) Bulk milk hauler/sampler--A bulk milk hauler/sampler is any person who collects official samples and may transport raw milk from a farm and/or raw milk products to or from a milk plant, receiving station or transfer station and has in their possession a certification from the department.

(7) Bulk milk pickup tanker--A vehicle, including the truck, tank and those appurtenances necessary for its use, used by a milk hauler to transport bulk raw milk for pasteurization from a dairy farm to a milk plant, receiving station, or transfer station.

(8) Certified milk sampler/collector--Any industry personnel, other than the milk hauler, or dairy plant sampler who collects more or stores an official milk sample.

(9) C-I-P or cleaned-in-place--The procedure by which sanitary pipelines or pieces of equipment are mechanically cleaned-in-place by circulation.

(10) Concentrated (condensed) milk--A fluid product, unsterilized and unsweetened, resulting from the removal of a considerable portion of the water from the milk, which, when combined with potable water in accordance with instructions printed on the container, results in a product conforming to the milkfat and milk solids not fat levels of milk as defined in this section.

(11) Concentrated (condensed) milk products--Homogenized concentrated (condensed) milk, concentrated (condensed) skim milk, concentrated (condensed) low fat milk, and similar concentrated (condensed) products made from concentrated (condensed) milk or concentrated (condensed) skim milk, and which, when combined with potable water in accordance with instructions printed on the container, conform to the definitions of the corresponding milk products in this section.

(12) Cream--The liquid milk product, high in milkfat, separated from milk, which may have been adjusted by adding thereto: milk, concentrated (condensed) milk, dry whole milk, skim milk, concentrated skim milk, or nonfat dry milk, and contains not less than 18% milkfat.

(13) Cultured milk--The food produced by culturing cream, milk, partially skimmed milk, or skim milk, used alone or in combination with characterizing microbial organisms. Cultured milk is further defined in Title 21, CFR, §131.112.

(14) Dairy farm--Any place or premises where one or more lactating animals (cows, goats or sheep, water buffalo, or other hooved animal) are kept, and from which a part or all of the milk or milk product(s) is provided, sold, or offered for sale to a milk plant, receiving station, or transfer station.

(15) Dairy plant or plant--Any place, premise, or establishment where milk or milk products are received or handled for processing or manufacturing.

(16) Dairy plant sampler--A department employee responsible for the collection of official samples for regulatory purposes outlined in §6 of the "Grade A Pasteurized Milk Ordinance."

(17) Dairy product--Butter, cheese, dry cream, plastic cream, dry whole milk, nonfat dry milk, dry buttermilk, dry whey, whey protein concentrates, evaporated milk (whole or skim), condensed whole milk and condensed skim milk (plain or sweetened), and such other products derived from milk, as may be specified under the statutory standard for butter (Title 21, U.S.C. Part 321a), and the Federal Standards of Identity for Cheese and Cheese Related Products (Title 21, CFR, Part 133).

(18) Dairy product manufacturer--Any place, premises or establishment where milk or milk products for manufacturing purposes are collected, handled, processed, dried, stored, pasteurized, ultra-pasteurized, aseptically processed, bottled, or prepared for distribution.

(19) Department--The Department of State Health Services, the Commissioner of Health, or his authorized representative. For purposes of this chapter, the Texas Department of Health is an equivalent term.

(20) Distributor--Any person who offers for sale or sells to another person any milk, milk products, or frozen dessert product.

(21) Drug--The term "drug" includes:

(A) articles recognized in the official United States Pharmacopeia, official Homeopathic Pharmacopeia of the United States or official National Formulary, or any supplement to any of them;

(B) articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals;

(C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and

(D) articles intended for use as a component of any articles specified in subparagraphs (A), (B) or (C) of this paragraph, but does not include devices or their components, parts or accessories.

(22) Eggnog--The food containing cream, milk, partially skimmed milk, or skim milk, used alone or in combination, liquid egg yolk, frozen egg yolk, dried egg yolk, liquid whole eggs, frozen whole eggs, dried whole eggs, or any one or more of the foregoing egg yolk containing products with liquid egg white or frozen egg white, and a nutritive carbohydrate sweetener. Eggnog is further defined in Title 21, CFR, §131.170.

(23) Federal Food Drug and Cosmetic Act (FFDCA)--The United States laws pertaining to food, drugs, and cosmetics as specified in Title 21 U.S.C., Chapter 9.

(24) Freezer--A piece of equipment which converts mix and/or other ingredients to a hardened or semi-hardened state using the technique of freezing during processing or manufacturing of those products commonly known as ice cream, ice cream mix, frozen dessert, frozen dessert mix, and nondairy frozen dessert mix.

(25) Frozen desserts--Any of the following: ice cream, light ice cream, ice milk, frozen custard, fruit sherbet, non-fruit water ice, frozen dietary dairy dessert, frozen yogurt, quiescently frozen confection, quiescently frozen dairy confection, mellorine, lorine, parevine, freezer-made milk shake, or nondairy frozen dessert. The term includes mix used in the freezing of one of those frozen desserts.

(26) Frozen dessert manufacturer or plant--A person who manufactures, processes, converts, partially freezes or freezes any mix,

be it dairy, nondairy frozen desserts for distribution or sale at wholesale. This definition shall not include a frozen dessert retail establishment.

(27) Frozen dietary dairy dessert and frozen dietary dessert--A food for any special dietary use, prepared by freezing, with or without agitation, composed of a pasteurized mix which may contain fat, protein, carbohydrates, flavoring, stabilizers, emulsifiers, vitamins, and minerals.

(28) Frozen low fat yogurt and mix (also called low fat frozen yogurt)--Complies with the provisions of frozen yogurt, except that:

(A) the milk fat content of the finished food is not less than 0.5%, but not more than 2.0%; and

(B) the name of the food is "frozen low fat yogurt."

(29) Frozen low fat yogurt dry mix--The unfrozen dry powdered combination of ingredients which, when combined with potable water and when frozen while stirring, will produce a product conforming to the definition of frozen low fat yogurt.

(30) Frozen milk concentrate--A frozen milk product with a composition of milkfat and milk solids not fat in such proportions that when a given volume of concentrate is mixed with a given volume of water the reconstituted product conforms to the milkfat and milk solids not fat requirements of whole milk. In the manufacturing process, water may be used to adjust the primary concentrate to the final desired concentration. The adjusted primary concentrate is pasteurized, packaged, and immediately frozen. This product is stored, transported, and sold in the frozen state.

(31) Frozen skim milk yogurt--Complies with the provision of frozen yogurt, except that:

(A) the milkfat content of the finished food is less than 0.5%; and

(B) the name of the food is either "frozen skim milk yogurt" or "frozen nonfat yogurt."

(32) Frozen yogurt--

(A) Frozen yogurt is the food which is prepared by freezing, while stirring, a mix composed of one or more of the optional dairy ingredients provided for in ice cream and frozen custard, and which may contain other safe and suitable ingredients.

(B) The dairy ingredient(s), with or without other ingredients, is/are pasteurized and subsequently cultured with bacterial cultures acceptable to the state health authority.

(C) The titratable acidity of the cultured frozen yogurt is not less than 0.5%, calculated as lactic acid, except if the frozen yogurt is flavored by the addition of a non-fruit characterizing ingredient(s).

(D) The milkfat content of frozen yogurt is not less than 3.25% by weight, except that when bulky characterizing ingredients are used the percentage milkfat is not less than 2.5%.

(E) The finished frozen yogurt shall weigh not less than five pounds per gallon.

(F) The name of the food is "frozen yogurt."

(33) Goats milk ice cream--The food defined in Title 21, CFR, §35.110(a) - (f).

(34) Goat milk--The normal lacteal secretion, practically free of colostrum, obtained by the complete milking of one or more healthy goats. Goat milk sold in retail packages shall contain not less than 2.5% milkfat and not less than 7.5% milk solids not fat. The word "milk" includes goat milk.

(35) Grade A dry milk and whey products--Products which have been produced for use in Grade A pasteurized or aseptically processed milk products and which have been manufactured under the provisions of the most current revision of the "Grade A Pasteurized Milk Ordinance."

(36) Grade A Pasteurized Milk Ordinance--The document published by the United States Department of Health and Human Services, Public Health Service/Food and Drug Administration. The document consists of the following parts: The Grade A Pasteurized Milk Ordinance with Administrative Procedures; illustrations, tables, supplements, appendices; and an index. Copies are on file in the Milk Group, Division for Regulatory Services, Department of State Health Services, 8407 Wall Street, Austin, Texas, and are available for review during normal business hours. For purposes of this chapter, "U.S. Public Health Services Grade A Pasteurized Milk Ordinance" is an equivalent term.

(37) Grade A retail raw milk--Milk as defined in paragraph (49) of this section, that is produced under the provisions of Subchapter B of this chapter (relating to Grade A Raw for Retail Milk and Milk Products), and is offered for sale to the public without benefit of pasteurization.

(38) Grade A retail raw milk products--Milk products that are manufactured under the provisions of Subchapter B of this chapter, and are offered for sale to the public without benefit of pasteurization. These products include: cream, light cream, light whipping cream, heavy cream, heavy whipping cream, whipped cream, whipped light cream, sour cream, acidified sour cream, cultured sour cream, half-and-half, sour half-and-half, acidified sour half-and-half, cultured sour half-and-half, skim milk, low fat milk, eggnog, buttermilk, cultured milk, cultured low fat milk, cultured skim milk, yogurt, low fat yogurt, and nonfat yogurt.

(39) Half-and-half--The food consisting of a mixture of milk and cream, which contains not less than 10.5% but less than 18% milkfat. Half-and-half is further defined in Title 21, CFR, §131.180.

(40) Heavy cream or heavy whipping cream--Cream which contains not less than 36% milkfat and as further defined in Title 21, CFR, §131.150.

(41) Hermetically sealed container--A container that is designed and intended to be secure against the entry of microorganisms and thereby maintain the commercial sterility of its contents after processing.

(42) Homogenized--The term "homogenized" means that milk or a milk product has been treated to insure breakup of the fat globules to such an extent that, after 48 hours of quiescent storage at 4.4 degrees Celsius (40 degrees Fahrenheit), no visible cream separation occurs on the milk; and the fat percentage of the top 100 milliliters of milk in a quart, or of proportionate volumes in containers of other sizes, does not differ by more than 10% from the fat percentage of the remaining milk as determined after thorough mixing.

(43) Ice cream and frozen custard--The foods defined in Title 21, CFR, §135.110(a) - (f).

(44) Light cream--Cream which contains not less than 18% but less than 30% milkfat, and as further defined in Title 21, CFR, §131.155.

(45) Light whipping cream--Cream which contains not less than 30% but less than 36% milkfat, and as further defined in Title 21, CFR, §131.157.

(46) Lorine--The food prepared from the same ingredients and in the same manner prescribed for mellorine and complies with all the provisions for mellorine except that:

(A) its content of fat is at least 2% but less than 6%;

(B) its content of milk solids not fat is not less than 10%;

(C) caseinates may be added when the content of total milk solids is not less than 10%;

(D) the provision for reduction in fat and milk solids not fat from the addition of bulky ingredients in mellorine does not apply;

(E) the quantity of food solids per gallon is not less than 1.2 pounds; and

(F) the name of the food is "Lorine."

(47) Low fat yogurt--The food produced by culturing cream, milk, partially skimmed milk, or skim milk, used alone or in combination with a characterizing bacterial culture that contains the lactic acid-producing bacteria, Lactobacillus bulgaricus and Streptococcus thermophilus. Low fat yogurt is further defined in Title 21, CFR, §131.203.

(48) Mellorine--The food defined in Title 21, CFR, §135.130(a) - (d).

(49) Milk--The lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows, sheep, goats, water buffaloes or other hooved animals, and as further defined in Title 21, CFR, §131.110.

(50) Milk distributors--Any person who offers for sale or sells to another person any milk or milk products.

(51) Milk hauler--Any person who transports raw milk and/or raw milk products to or from a milk plant, receiving station, or transfer station.

(52) Milk plant--Any place, premises or establishment where milk or milk products are collected, handled, processed, dried, stored, pasteurized, ultra-pasteurized aseptically processed, bottled, or prepared for distribution. This term also means a processing plant, manufacturing plant, or bottling plant in these sections.

(53) Milk producer--Any person who operates a dairy farm and provides, sells or offers milk for sale to a milk plant, receiving station, or transfer station.

(54) Milk products--

(A) Milk products include cream, light cream, light whipping cream, heavy cream, heavy whipping cream, whipped cream, whipped light cream, sour cream, acidified sour cream, cultured sour cream, half-and-half, sour half-and-half, acidified sour half-and-half, cultured sour half-and-half, reconstituted or recombined milk and milk products, concentrated (condensed) milk, concentrated (condensed) milk products, reduced fat milk, nonfat (skim) milk, low fat milk, frozen milk concentrate, eggnog, buttermilk, cultured milk, cultured low fat milk, cultured nonfat (skim) milk, yogurt, low fat yogurt, nonfat yogurt, acidified milk, acidified low fat milk, acidified nonfat (skim) milk, low-sodium milk, low-sodium low fat milk, low-sodium nonfat (skim) milk, lactose-reduced milk, lactose-reduced low fat milk, lactose-reduced nonfat (skim) milk, aseptically processed and packaged milk and milk products as defined in this section, milk, low fat milk, or nonfat (skim) milk with added safe and suitable microbial organisms, and any other milk product made by the addition or subtraction of milkfat or addition of safe and suitable optional ingredients for protein, vitamin, or mineral fortification of milk products defined herein.

(B) Milk products also include those dairy foods made by modifying the federally standardized products listed in this section in accordance with Title 21, CFR, §130.10, Requirements for foods named by use of nutrient content claim and standardized term.

(C) This definition shall include those milk and milk products, as defined herein, which have been aseptically processed and then packaged.

(D) Milk and milk products which have been retort processed after packaging or which have been concentrated, condensed, or dried are included in this definition only if they are used as an ingredient to produce any milk or milk product defined herein, or if they are labeled as Grade A.

(E) This definition is not intended to include dietary products (except as defined herein), infant formula, ice cream or other desserts, butter, or cheese.

(55) Milk for manufacturing purposes--Milk and milk products for human consumption, but not subject to Grade A requirements.

(56) Milk tank truck--The term used to describe both a bulk milk pickup tanker and a milk transport tank.

(57) Milk tank truck driver--A milk tank truck driver is any person who transports raw or pasteurized milk products to or from a milk plant, receiving station, or transfer station. Any transportation of a direct farm pickup requires the milk tank truck driver to have responsibility for accompanying official samples.

(58) Milk transport tank or tanker--A vehicle, including the truck and tank, used by a milk hauler to transport bulk shipments of milk from a milk plant, receiving station, or transfer station to another milk plant, receiving station, or transfer station.

(59) Misbranded milk and milk products--Milk and milk products are misbranded if:

(A) its container(s) bear or are accompanied by any false or misleading written, printed, or graphic matter;

(B) milk does not conform to the definitions as contained in these rules;

(C) milk is not labeled in accordance with §217.25 of this title (relating to Labeling) for Grade A Raw for Retail Milk and Milk Products; §217.43 of this title (relating to Labeling) for Rules for the Manufacture of Frozen Desserts; §217.81 of this title (relating to Labeling) for Dairy Product Manufacturers; or

(D) one or more of the conditions described in §403 of the Federal Food, Drug and Cosmetic Act, as amended (Title 21, U.S.C., Part 343) exist.

(60) Milk transportation company--A milk transportation company is the person responsible for a milk tank truck(s).

(61) Multi-use container--Any container having a product-contact surface and used in the packaging, handling, storing, or serving of milk or milk products, which, if it remains in good repair and is properly washed and sanitized, may be utilized for multiple usage.

(62) Nondairy frozen dessert--

(A) Nondairy frozen dessert is the food which is prepared by freezing, while stirring, a nondairy frozen dessert mix composed of one or more of the optional characterizing ingredients specified in subparagraph (B) of this paragraph, sweetened with one or more of the optional sweetening ingredients specified in subparagraph (C) of this paragraph. The nondairy product, with or without water added,

may be seasoned with salt. One or more of the ingredients specified in subparagraph (D) of this paragraph may be used. Pasteurization is not required. The optional caseinates specified in subparagraph (D)(i) of this paragraph are deemed not to be dairy products.

(B) The optional flavoring ingredients referred to in subparagraph (A) of this paragraph are natural and artificial flavoring and characterizing food ingredients.

(C) The optional sweetening ingredients referred to in subparagraph (A) of this paragraph are sugar (sucrose), dextrose, invert sugar (paste or syrup), glucose syrup, dried glucose syrup, corn sweetener, dried corn sweetener, malt syrup, malt extract, dried malt syrup, dried malt extract, maltose syrup and dried maltose syrup.

(D) Other optional ingredients referred to in subparagraph (A) of this paragraph are:

(i) casein prepared by precipitation with gums, ammonium, caseinate, calcium caseinate, potassium caseinate, or sodium caseinate;

(ii) hydrogenated and partially hydrogenated vegetable oil;

(iii) dipotassium phosphate;

(iv) coloring, including artificial coloring;

(v) monoglycerides, diglycerides, or polysorbates; and

(vi) thickening ingredients such as agar-agar, algin (sodium alginate), egg white, gelatin, gum acacia, guar seed gum, gum karaya, locus bean gum, oat gum, gum tragacanth, hydroxypropyl, cethyl cellulose, carrageenan, salts of carrageenan, furcelleran, salts of furcelleran, propulene glycol alginate, pectin, psyllium seed husk, and sodium carvoxymethylcellulose.

(E) Such nondairy frozen desserts are deemed "processed" when manufactured as a dry powdered mix. The addition of water is merely the manner in which such nondairy frozen desserts are served.

(F) The label shall comply with labeling requirements for frozen desserts with the additional clear and concise statement that the product is nondairy.

(63) Nonfat yogurt--The food produced by culturing skim milk, used alone or in combination with a characterizing bacterial culture that contains the lactic acid-producing bacteria, Lactobacillus bulgaricus and Streptococcus thermophilus. Nonfat yogurt is further defined in Title 21, CFR, §131.206.

(64) Novelties--Frozen desserts, either alone or in combination with other foods such as cookies, wafers, cones, coating, confections, etc., which are packaged in single-serving units.

(65) Official laboratory--A biological, chemical or physical laboratory which is under the direct supervision of the State or a local regulatory agency.

(66) Overrun--The trade expression used to reference the increase in volume of frozen product over the volume of the mix. This increase in volume is due to air being whipped into the product during the freezing process. It is expressed as a percent of the volume of the mix.

(67) Officially designated laboratory--A commercial laboratory authorized to do official work by the regulatory or supervision agency, or a milk industry laboratory officially designated by the regulatory agency for the examination of milk, milk products, or frozen desserts.

(68) Pasteurization--

(A) The terms "pasteurization," "pasteurized," and similar terms shall mean the process of heating every particle of milk or milk product, in properly designed and operated equipment, and held continuously at or above a certain temperature for at least the corresponding specified time as shown in the following chart and referenced in the most current revision of the "Grade A Pasteurized Milk Ordinance."

Figure: 25 TAC §217.1(68)(A)

(B) Provided, that eggnog and frozen dessert mixes shall be heated to at least the temperature and time specifications in the following chart.

Figure: 25 TAC §217.1(68)(B)

(C) Provided further, that nothing shall be construed as barring any other process found equivalent to pasteurization for milk and milk products, which has been recognized by the United States Food and Drug Administration (FDA) as provided in §343(h)(3) of the Federal Food, Drug and Cosmetic Act. Only such FDA recognized processes and no other shall be considered by the department.

(69) Permit--A license or certification to engage in the activity listed on the permit, license, or certificate.

(70) Person--The word "person" shall include any individual, plant operator, partnership, corporation, company, firm, trustee, association, or institution.

(71) Producer dairy farm--Any place or premises where one or more lactating animals (cows, goats or sheep, water buffalo, or other hooved animal) are kept, and from which a part or all of the milk or milk product(s) is provided, sold, or offered for sale to a milk plant, transfer station, or receiving station.

(72) Quiescently frozen confection--A clean and wholesome frozen, sweetened, flavored product in the manufacture of which freezing has not been accompanied by stirring or agitation (generally known as quiescent freezing). This confection may be acidulated with food grade acid, may contain water, may be made with or without added natural or artificial flavoring, and with or without harmless coloring. The finished product shall contain not less than 17% by weight of total food solids. In the production of this food, no processing or mixing shall be used that develops in the finished food mix any physical expansion in excess of 10%.

(73) Quiescently frozen dairy confection--A clean and wholesome frozen product made from water, milk products and sugar, with added harmless natural or artificial flavoring, with or without added coloring, with or without added stabilizer, with or without added emulsifier; and in the manufacture of which freezing has not been accompanied by stirring or agitation (generally known as quiescent freezing). It contains not less than 13% by weight of total milk solids, and not less than 33% by weight of total food solids. In the production of quiescently frozen dairy confections, no processing or mixing prior to quiescently freezing shall be used that develops in the finished confection mix any physical expansion in excess of 10%.

(74) Receiving station--Any place, premises, or establishment where raw milk is received, collected, handled, stored, or cooled and prepared for further transporting.

(75) Reconstituted or recombined milk and milk products--Milk or milk products defined in this section which result from reconstituting or recombining of milk constituents with potable water when appropriate.

(76) Regulatory agency--The Department of State Health Services. For purposes of this chapter, Texas Department of Health is an equivalent term.

(77) Safe and suitable--Ingredients which perform an appropriate function in the food in which they are used, and are used at a level no higher than necessary to achieve their intended purpose in the food.

(78) Sale--Shall mean any of the following:

(A) the manufacture, production, processing, packing, exposure, offer, or holding of any milk, milk product, or frozen dessert product.

(B) the sale, dispensing, or giving of any milk, milk product, or frozen dessert product; or

(C) the supplying of any milk, milk product, or frozen dessert to a retail establishment or to a consumer.

(79) Sanitization--The application of any effective method or substance to a clean surface for the destruction of pathogens and other organisms as far as is practicable. Such treatment shall not adversely affect the equipment, the milk or milk product, or the health of consumers, and shall be acceptable to the regulatory agency.

(80) Sherbet--The food defined in Title 21, CFR, §135.140(a) - (i).

(81) Single service container--Any container having a milk product or frozen dessert, in contact with the containers surface and used in the packaging, handling, storing, or serving frozen desserts and/or milk products, which is intended for one usage only.

(82) Sour cream or cultured sour cream--The product resulting from the souring, by lactic acid producing bacteria, of pasteurized cream, and as further defined in Title 21, CFR, §131.160.

(83) Standard methods--Reference to the latest edition of "Standard Methods for the Examination of Dairy Products," a publication of the American Public Health Association, Washington, D.C.

(84) Sterilized--The term sterilized when applied to piping, equipment, and containers used for milk and milk products shall mean the condition achieved by the application of heat, chemical sterilant(s), or other appropriate treatment that renders the piping, equipment, and containers free of viable microorganisms.

(85) 3-A Sanitary Standards and Accepted Practices--Refers to the standards for dairy equipment and accepted practices formulated by the 3-A Sanitary Standards committees representing the International Association for Food Protection, the U.S. Public Health Service, and the Dairy Industry Committee that are published by the International Association of Milk, Food, and Environmental Sanitarians, 6200 Aurora Avenue, #200W, Des Moines, Iowa 50322.

(86) 3-A Sanitary Committee--The committee composed of appointees from the International Association for Food Protection, and the Food and Drug Administration/Public Health Service that reviews and establishes standards for production and processing equipment intended for use in this country.

(87) Milk tank truck cleaning facility--Any place, premise, or establishment, separate from a milk plant, receiving, or transfer station, where a milk tank truck is cleaned and sanitized.

(88) Transfer station--Any place, premises, or establishment where milk or milk products are transferred directly from one milk tank truck to another.

(89) Ultra-pasteurized--The term "ultra-pasteurized," when used to describe a dairy product, means that such product shall have been thermally processed at or above 138 degrees Celsius (280 degrees Fahrenheit) for at least two seconds, either before or after packaging, so as to produce a product which has an extended shelf life under refrigerated conditions.

(90) Unloading station--Any receiving station, transfer station, or milk processing plant where milk or milk products are unloaded from milk tank trucks.

(91) Water ices--The foods defined in Title 21, CFR, §135.160.

(92) Whipped cream--Cream or light whipping cream, into which air or gas has been incorporated.

(93) Whipped light cream--Light cream into which air or gas has been incorporated.

(94) Yogurt--The food produced by culturing cream, milk, partially skimmed milk, or skim milk, used alone or in combination with a characterizing bacterial culture that contains the lactic acid-producing bacteria, Lactobacillus bulgaricus and Streptococcus thermophilus. Yogurt is further defined in Title 21, CFR, §131.200.

§217.2. Grade A Pasteurized Milk Ordinance.

The Department of State Health Services adopts by reference the document entitled, "Grade A Pasteurized Milk Ordinance," published by the United States Department of Health and Human Services, Public Health Service/Food and Drug Administration. The document consists of the following parts: The Grade A Pasteurized Milk Ordinance with Administrative Procedures; illustrations, tables, supplements, appendices; and an index. Copies are on file in the Milk Group, Division for Regulatory Services, Department of State Health Services, 8407 Wall Street, Austin, Texas, and are available for review during normal business hours.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 16, 2009.

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Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. RULES FOR THE MANUFACTURE OF FROZEN DESSERTS

25 TAC §§217.41 - 217.51

STATUTORY AUTHORITY

The new rules are authorized by Health and Safety Code, §12.0111, which requires the department to charge fees for issuing or renewing a license sufficient to recover costs; §12.0112, which requires the term of each license issued to be two years; Health and Safety Code, §§431.241, 435.009(c), and 440.006, which provide the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapters 431, 435, and 440; and Government Code, §531.0055, and Health

and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The new rules affect the Health and Safety Code, Chapters 12, 431, 435, 440, and 1001; and Government Code, Chapters 531 and 2001.

§217.41. Introduction.

These sections provide for uniformity of inspections of the premises of frozen desserts manufacturers; protect the health and safety of consumers by preventing the manufacture or distribution of frozen desserts, products sold in semblance of frozen desserts, or mixes for those products that do not meet state requirements or related requirements of purity or labeling; and assist manufacturers in meeting state requirements.

§217.42. Permits.

Every frozen desserts manufacturer located in the State of Texas, and every frozen desserts manufacturer that exports frozen desserts into the State of Texas shall secure a permit. Only a person who complies with the requirements of these rules shall be entitled to receive and retain such a permit.

§217.43. Labeling.

(a) The labeling on all packages or containers of frozen desserts or mix designed for sale at retail shall clearly and conspicuously include:

(1) the name of the food as provided for in the definitions and standards established by this chapter;

(2) quantity of contents;

(3) name and address of the manufacturer, packer or distributor, provided that, in addition, the manufacturer's plant code number shall appear if the manufacturer's name and address are not included on the label; and

(4) flavor labeling, if the food contains any added characterizing ingredients.

(b) The label information shall be in letters of a size, style and color which are approved by the department, and shall contain no marks or words which are misleading. The label may contain ingredient and/or nutrition information, provided the information is in compliance with Title 21, Code of Federal Regulations.

§217.44. Inspection of Frozen Desserts Plants.

(a) Prior to the issuance of a permit, and at least once every three months thereafter, the department shall inspect all frozen desserts plants within the State of Texas, the products of which are intended for consumption within the State of Texas, and shall make as many additional inspections as are necessary for the enforcement of these rules. If the department representative discovers the violation of any sanitation requirement, a representative shall make a second inspection after a lapse of such time as the representative may deem necessary for the defect to be remedied, but not before the lapse of three days. The second inspection shall be used in determining compliance with these regulations. Any violation of the same sanitation requirement of these regulations on two consecutive inspections shall be the basis for immediate suspension of permit.

(b) The original copy of the inspection report shall be posted by the department in a conspicuous place upon an inside wall of the frozen desserts plant and said inspection report shall not be defaced or removed by any person except the department. Another copy of such inspection report shall be filed with the records of the department.

(c) Every processor or manufacturer of mix or frozen desserts shall permit upon request a department representative access to all parts of the frozen dessert or mix establishment; and shall furnish the department, upon request, a true statement of the actual quantities of mix or frozen desserts used or produced.

§217.45. Examination and Standards for Frozen Desserts.

(a) During any consecutive six months, at least four samples of raw milk intended for use in the manufacture of frozen desserts shall be collected and examined by the department. In addition, during any consecutive six months, the department shall collect and examine at least four samples of frozen desserts from dairy retail stores, food service establishments, grocery stores, and other places where frozen desserts are sold may be examined periodically as determined by the department. Proprietors of such establishments shall furnish the department, upon request, with the names of all distributors from whom frozen desserts, or frozen desserts mix are obtained. The examination of samples of pasteurized mix, and/or frozen desserts shall be performed in an official laboratory or in an officially designated laboratory.

(b) Bacterial counts, coliform determinations, phosphatase, tests, and other laboratory and screening tests shall conform to the procedures in the latest edition of "Standard Methods for the Examination of Dairy Products" of the American Public Health Association. Examinations and tests shall include such other biological, chemical, and physical determinations as the department shall deem necessary for the detection of adulteration.

(c) Whenever two of the last four consecutive bacterial counts, coliform determinations, or cooling temperatures taken on separate days exceed the limit of the standard for the milk, cream, milk products, mix or frozen desserts, the department shall send a written notice thereof to the person concerned. This notice shall be in effect so long as two of the last four consecutive samples exceed the limit of the standards. An additional sample shall be taken within 21 days of the date of such notice, but not before the lapse of three days. Immediate product suspension or other appropriate department or court action shall be instituted whenever the standard is violated by three of the last five bacterial counts, coliform determinations or cooling temperatures of samples collected within the six-month period.

(d) The department shall establish the frequency of sampling pasteurized mix or frozen desserts during each six month period for adequate pasteurization as determined by a phosphatase test. In the case of a confirmed positive result, the probable cause shall be determined by and corrected to the satisfaction of the department before the mix is frozen or the frozen dessert is sold.

(e) No process or manipulation other than pasteurization as set forth in §217.1 of this title (relating to Definitions) of these rules, processing methods integral therewith, and appropriate refrigeration shall be applied to milk and milk products for the purpose of removing or deactivating organisms, provided, that nothing shall be construed as barring any other process found equivalent to pasteurization for milk and milk products, which has been recognized by the United States Food and Drug Administration (FDA) as provided in §343(h)(3) of the Federal Food, Drug and Cosmetic Act. Only such FDA recognized processes and no other shall be considered by the department.

(f) Raw milk for use in the manufacture of frozen desserts shall comply with all standards set forth in §217.73 of this title (relating to Raw Milk for Manufacturing Purposes).

(g) Frozen desserts and mix shall comply with the following standards:

(1) bacterial, coliform, and temperature standards for pasteurized mix and frozen desserts as shown in the following chart:
Figure: 25 TAC §217.45(g)(1)

(2) bacterial, coliform, and temperature standards for nondairy frozen desserts and nondairy frozen desserts mix as shown in the following chart:
Figure: 25 TAC §217.45(g)(2)

§217.46. Sanitation Standards for Frozen Desserts Plants.

(a) Floors. The floors of all rooms in which mix, frozen desserts, or their ingredients are manufactured, processed, or frozen, or in which containers and utensils are washed, shall be constructed of concrete or other equally impervious and easily cleaned material, and shall be smooth, properly drained, provided with trapped drains, and kept clean and in good repair; provided, that cold storage rooms used for storing frozen desserts and cold storage rooms used for storing milk, cream, or milk products, frozen fruits, frozen eggs, and comparable ingredients need not be provided with floor drains but the floors shall be sloped to drain to one or more exits, and shall be kept clean and in good repair; provided that, dry storage rooms need not be drained and tight wood floor construction is optional. Provided further, that the construction requirements of this item shall be waived in the case of frozen desserts establishments, if that portion of the room in which the freezer is installed and the room in which containers or utensils are washed have floors of metal, durable grades of linoleum or plastic, or tight wood impregnated with plastic in lieu of concrete.

(b) Walls and ceilings. Walls and ceilings of rooms in which mix, frozen desserts, or their ingredients are manufactured, processed, or frozen, or in which containers or utensils are washed shall have easily cleanable, washable light-colored surfaces, and shall be kept clean and in good repair.

(c) Doors and windows. Unless other effective means are provided to prevent the access of flies, all openings to the outer air shall be effectively screened, and all doors shall be self-closing.

(d) Lighting and ventilation.

(1) All rooms shall be well lighted.

(2) All rooms shall be well ventilated.

(e) Miscellaneous protection from contamination.

(1) Frozen desserts plant operations shall be located and conducted as to prevent any contamination of the ice cream, ice cream mix, frozen desserts, frozen desserts mix, or their ingredients, or of cleaned equipment.

(A) All milk, milk products, cream, mix or frozen desserts that have been spilled, overflowed, or leaked shall be discarded.

(B) All milk, milk products, cream or mix drained from equipment at the end of a run shall be handled in a sanitary manner and shall be repasteurized.

(C) All necessary and appropriate means shall be used for the elimination of flies, other insects and rodents.

(D) Rooms shall be free of flies.

(E) There shall be separate rooms for:

(i) pasteurization, processing, cooling, freezing, and packaging operations; and

(ii) the washing and bactericidal treatment of multi-use containers.

(F) Unless all milk, cream, mix or milk products are received in bulk transport tanks, a receiving room separate from rooms as defined in subparagraph (E)(i) and (ii) of this paragraph shall also be required; provided, that the requirement in subparagraph (E)(i) of this paragraph shall be satisfied when a frozen dessert manufacturer blends, freezes, and packages in a manner to prevent contamination; provided further, that frozen desserts, milk, milk products, and ingredients shall not be unloaded directly into the room or rooms used for pasteurizing.

(G) Pasteurized mix or frozen desserts shall not be permitted to come in contact with equipment or containers with which unpasteurized mix, frozen desserts, cream, milk or milk products have been in contact, unless such equipment has first been thoroughly cleaned and subjected to a bactericidal treatment.

(H) Rooms in which milk or milk products, cream, mix or frozen desserts are handled or stored shall not open into any stable or living quarters.

(I) The milk plant, frozen dessert plant, containers, utensils, and equipment shall be used for no purpose other than the processing of milk, cream, milk products, mix, and frozen desserts, and the operation incident thereto, except as may be approved in writing by the department.

(2) The pump-out of the transport tank shall be done in an area where a cover extends over the complete transport tank or, where climatic and operating conditions require, in a completely enclosed area. Pump-out operations must be protected in such a manner as to prevent product contamination. If the area is not completely enclosed or doors of the unloading area are open during unloading, a suitable filter is required for the manhole or the air inlet vent.

(3) The agitating and sampling of the transport tank milk shall be accomplished in such a manner as to provide maximum protection against product contamination. In no instance shall this be done at a place other than an approved unloading station.

(4) The frozen dessert plant shall record the following information on each load of milk received, and maintain these records for a period of not less than 90 days:

(A) the date the load was received;

(B) the time received;

(C) the number of pounds in the load;

(D) the temperature of the milk or milk products when received;

(E) the permit number of the truck delivering the milk; and

(F) the name of the station operator receiving the milk.

(5) If the frozen dessert plant is also utilized as the milk tank truck cleaning facility, the transport tank cleaning tag shall be removed and kept with the other records for a period of 15 days.

(6) In no case shall milk or milk products be received from a transport tank that appears to be damaged, dirty, or does not have a cleaning tag attached without the written permission of the department.

(f) Toilet facilities. Every frozen desserts plant shall be provided with conveniently located toilet facilities conforming with the state, local and county ordinances. Toilet rooms shall not open into any room in which mix is processed or handled. The doors of all toilet rooms shall be self-closing. Toilet rooms shall be kept in a clean condition, in good repair and well ventilated. A sign directing employees to wash their hands before returning to work shall be posted in all toilet rooms used by employees.

(g) Water supply. The water supply shall be easily accessible, adequate, and of a safe sanitary quality.

(h) Hand washing facilities. Convenient hand washing facilities shall be provided, including hot and cold running water, soap, and approved sanitary towels. Hand washing facilities shall be kept clean. The use of a common towel is prohibited. Employees shall not resume work after using the toilet room without washing their hands.

(i) Sanitary piping and fittings. All piping and fittings used to conduct milk, cream, milk products, mix or frozen desserts shall be of sanitary design and construction which meets 3-A Sanitary Standards and Accepted Practices. Mix, frozen desserts, fluid milk products, and ingredients shall be conducted from one piece of equipment to another only by sanitary piping and fittings.

(j) Construction and repair of containers, utensils, and equipment.

(1) All multi-use containers, utensils, and equipment with which mix, frozen desserts, milk, cream, and milk products, and ingredients come in contact shall be of smooth, impervious, non-corrodible, nontoxic, relatively low absorbent material; shall be easily cleanable and shall be kept in good repair.

(2) All single-service containers, closures, gaskets, and other articles shall be manufactured, packaged, transported, and handled in a sanitary manner.

(k) Disposal of wastes. All wastes shall be disposed of in a sanitary manner. All plumbing and appurtenances thereto shall be so designed and installed as to prevent the contamination of frozen desserts or any ingredient, utensil, container, or equipment by drip, condensation, or backflow.

(l) Cleaning and bactericidal treatment of multi-use utensils, containers, and equipment. All multi-use containers and utensils shall be thoroughly cleaned after each use and all equipment shall be thoroughly cleaned at least once each day of use, unless the department has reviewed and accepted information in writing, supporting the cleaning of multi-use containers and utensils at frequencies extending beyond one day or 72 hours in the case of storage tanks, or 44 hours in the case of evaporators, which are continuously operated. Supporting information shall be submitted to and approved by the department prior to initiating the qualification period if required. Any significant equipment or processing changes shall be communicated to the department, and may result in a re-verification of the extended run proposal, if it is determined that the change could potentially affect the safety of the finished milk or milk product(s).

(m) Storage of multi-use utensils, containers, and equipment. After cleaning, all multi-use utensils, containers, and equipment shall be stored to drain dry, and in such a manner as not to be contaminated before usage.

(n) Storage of single-service containers, utensils, and materials. Caps, parchment papers, wrappers, liners, gaskets and single-service sticks, spoons, covers, and containers for frozen desserts, mix, or their ingredients shall be purchased and stored only in sanitary tubes, wrappings, or cartons; shall be kept thereafter in a clean, dry place until used; and shall be handled in a sanitary manner. Reuse of single-service articles is prohibited.

(o) Handling of containers and equipment. Between bactericidal treatment and usage, and during usage, containers and equipment shall not be handled or operated in such a manner as to permit contamination of the mix, frozen desserts, or their ingredients. Pasteurized mix and frozen desserts shall not be permitted to come into contact with equipment with which unpasteurized mix, milk, cream, or milk products have been in contact, unless the equipment has been thoroughly cleaned and effectively subjected to an approved bactericidal process.

(p) Pasteurization of mix.

(1) Every particle of the combined milk, cream, milk product, or other ingredients used in the manufacture of a frozen dessert mix shall be heated and held at temperatures of not less than 155 degrees Fahrenheit for not less than 30 minutes; 180 degrees Fahrenheit for not less than 15 seconds; or 175 degrees Fahrenheit for not less than 25 seconds.

(2) All pasteurization equipment and related appurtenances shall meet construction and operational requirements outlined in the latest edition of the "Grade A Pasteurized Milk Ordinance" which is adopted by reference in §217.2 of this title (relating to Grade A Pasteurized Milk Ordinance).

(3) Nothing shall be construed as barring any other process found equivalent to pasteurization for milk and milk products, which has been recognized by the United States Food and Drug Administration (FDA) as provided in §343(h)(3) of the Federal Food, Drug and Cosmetic Act. Only such FDA recognized processes and no other shall be considered by the department.

(q) Cooling and handling. All milk, cream, and milk products in fluid form received at the frozen desserts plant for use in frozen desserts mix shall be cooled to a temperature of 45 degrees Fahrenheit or less and maintained at that temperature until pasteurized; and all pasteurized mix shall be cooled in approved equipment to a temperature of 45 degrees Fahrenheit or less and shall be maintained thereat until frozen.

(r) Packaging and dispensing. Packaging, cutting, molding, dispensing, and other preparation of mix, or frozen desserts, or their ingredients shall be done in a sanitary manner. Containers shall be completely covered immediately after filling unless dispensed to a patron. Closures, covers, and wrappers shall be handled in such a manner as to prevent contamination of the package content.

(s) Returns. Packaged mix, or frozen desserts which have physically left the premises or the frozen dessert plant shall not be re-pasteurized to be sold or used for making frozen desserts.

(t) Overflow and spillage. Product drip or overflow, or spilled mix, or frozen desserts, or their ingredients, shall not be sold for human consumption.

(u) Personnel health. No person while affected with any disease in a communicable form, or while a carrier of such disease, or while afflicted with boils, infected wounds, sores, or an acute respiratory infection, shall engage in pasteurizing, handling of ingredients, filling, packaging, or freezing operations or in any capacity in which there is a likelihood of such person contaminating mix and frozen desserts, or mix and frozen dessert-contact surfaces with pathogenic organisms, or transmitting disease to other individuals; and no person known or suspected of being affected with any such disease or condition shall be employed in such a capacity. If the management of the frozen desserts plant has reason to suspect that any employee has contracted any disease in a communicable form or has become a carrier of such disease, the employee shall notify the department immediately.

(v) Personnel cleanliness. All persons who come in contact with milk, cream, milk products, mix, and frozen desserts containers or equipment, shall wear clean outer garments, hair restraints and shall keep their hands clean at all times while engaged in such work.

(w) Vehicles.

(1) All vehicles used for the transportation of mix, frozen desserts, cream, milk, and milk products shall be constructed and operated so as to protect their contents from the sun and contamination. Such vehicles shall be kept clean, and no substance capable of contaminating mix, frozen desserts, cream, milk, and milk products shall be transported therein. Such vehicles shall have the name of the distributor prominently displayed thereon.

(2) Tank cars and tank trucks used for transporting mix, cream, milk, and milk products shall comply with the construction, cleaning, bactericidal treatment, storing, and handling requirements of subsections (e), (j), (l), and (m) of this section. Each shipment shall be sealed and labeled in a manner approved by the department.

(x) Ingredients. All mix and frozen dessert ingredients shall be clean, have a fresh wholesome flavor and odor and normal appearance, be of satisfactory quality, and be stored, handled, and processed in a sanitary manner.

(y) Raw product storage.

(1) All milk shall be held and processed under conditions and at temperatures that will avoid contamination and rapid deterioration. Raw milk in storage tanks within the dairy plant shall be handled in such a manner as to minimize bacterial increase and shall be maintained at 45 degrees Fahrenheit or lower until processing begins. This does not preclude holding milk at higher temperatures for a period of time, where applicable to particular manufacturing or processing practices.

(2) The bacteriological quality of commingled raw milk for use in the manufacture of frozen desserts shall not exceed 500,000 per milliliter.

§217.47. Frozen Desserts Which May Be Sold.

No frozen desserts that have been manufactured in Texas shall be sold to the final consumer or to restaurants, soda fountains, grocery stores, dairy stores, or similar establishments within the State of Texas, unless it has been manufactured and frozen in a plant conforming with the requirements of this subchapter.

§217.48. Transferring and Dispensing Frozen Desserts.

Except as permitted by the department, no person shall transfer frozen desserts from one container to another on the street, or in any vehicle or store, or in any place except under sanitary conditions.

§217.49. Mix and Frozen Desserts from Points Beyond the Limits of Routine Inspection.

(a) Generally. Frozen desserts from points beyond the limits of routine inspection of the State of Texas may be sold in the State of Texas, provided they are manufactured and/or pasteurized under provisions which are substantially equivalent to the requirements of this regulation as determined in writing by the department.

(b) Approval of supplies. Subject to laboratory tests upon arrival, the department shall approve, without inspection, supplies of frozen dessert mix, and frozen desserts from an area not under the department's routine inspection:

(1) when these products are manufactured and/or pasteurized under regulations equivalent to those of this regulation; or

(2) when these products are under routine official supervision.

§217.50. Plans for Construction and Reconstruction of Frozen Desserts Plants.

(a) All frozen desserts plants in the State of Texas, which are constructed or extensively altered, shall obtain signed approval from the department for said construction before work is begun.

(b) All new frozen desserts plants applying for a permit, and all new construction, reconstruction, or extensive alterations made shall comply with the requirements of this regulation.

§217.51. Procedure When Infection Is Suspected.

When probable cause exists to suspect the possibility of infection from any person concerned with the handling of mix, frozen desserts, or their ingredients, the department is authorized to require any or all of the following measures:

(1) the immediate exclusion of that person from handling mix, frozen desserts, or their ingredients;

(2) the immediate exclusion of the mix or frozen desserts concerned from distribution and use; and

(3) adequate medical examination of the person before returning to frozen dessert handling.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
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SUBCHAPTER D. BULK MILK REGULATIONS

25 TAC §§217.61 - 217.65

STATUTORY AUTHORITY

The new rules are authorized by Health and Safety Code, §12.0111, which requires the department to charge fees for issuing or renewing a license sufficient to recover costs; §12.0112, which requires the term of each license issued to be two years; Health and Safety Code, §§431.241, 435.009(c), and 440.006, which provide the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapters 431, 435, and 440; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The new rules affect the Health and Safety Code, Chapters 12, 431, 435, 440, and 1001; and Government Code, Chapters 531 and 2001.

§217.61. Bulk Milk Hauler/Sampler Qualifications and Requirements.

(a) Requirements for bulk milk hauler/sampler certifications.

(1) Each hauler/sampler shall complete a comprehensive training program provided by the department, which shall include a course teaching specific procedures necessary to properly handle milk from the dairy farm to the plant, receiving station, or transfer station.

This program shall further include practical field training sufficient to develop a proficient working knowledge of proper bulk milk handling procedures.

(2) After training has been completed, each hauler/sampler shall pass a qualifying examination administered by the department. Candidates failing the exam with a score of less than 70%, shall be denied permits or licenses until they can achieve a passing score of 70%. The examination should be adequate enough to determine if a bulk milk hauler/sampler is competent. The exam shall be composed of a minimum of 20 total questions broken down into the following areas:

(A) six questions relating to sanitation and personal cleanliness;

(B) six questions relating to sampling and weighing procedures;

(C) four questions relating to equipment, including proper use, care, cleaning, etc.; and

(D) four questions relating to proper record keeping requirements.

(3) An industry sponsored training program may be used in lieu of this program, provided that:

(A) such training program meets or exceeds the minimum standards and requirements set forth in these regulations;

(B) the department has issued a letter indicating the acceptance of the training program; and

(C) the qualifying examination is administered by the department.

(4) Bulk milk haulers/samplers successfully qualifying by examination and who have been satisfactorily evaluated in the field will be certified by the department to perform milk hauler/sampler duties. Only those milk haulers/samplers having certification issued by the department or by the authorized Regulatory Agency of another state will be allowed to remove milk from a farm bulk milk tank and collect milk samples for laboratory examination.

(5) All official milk samplers, including bulk milk haulers/samplers, shall be evaluated at least once every 24 months by the department or by the authorized Regulatory Agency of another state.

(6) The department may issue temporary hauler/sampler certifications in emergency situations without the prescribed examinations, evaluation and training program, provided acceptable certification of competence is made by the employer of the individual. A temporary permit is only valid for 30 days.

(7) The department may suspend a hauler/sampler certification when, upon investigation, the department finds a violation of any of the following:

(A) this subchapter; or

(B) §217.2 of this title (relating to Grade A Pasteurized Milk Ordinance).

(b) Procedure and Handling Requirements.

(1) Each bulk milk pickup tanker shall be supplied with sanitized sample bottles or bags, other sampling equipment, and supplies necessary, as required in §217.2 of this title to clean and sanitize multi-use equipment used in sampling and pickup operations.

(2) All bulk milk haulers operating bulk milk pickup tankers shall make available to the department upon request a copy of the load manifest and a current list of producers for each route pickup load with the following information:

(A) the producer name and number in the order of milk pickup;

(B) the time of arrival at each dairy;

(C) the time of arrival at the unloading station;

(D) the name and address of the unloading station; and

(E) the hauler/sampler name and driver's license number.

§217.62. Bulk Milk Holding Tanks.

(a) Farm bulk milk tanks shall have a capacity adequate for production between routine pickups. The time between pickups shall not exceed every other day. Milk must be of sufficient quantity for adequate mechanical agitation at the completion of the first milking.

(b) Farm bulk milk tanks shall be equipped with an indicating thermometer, the sensor of which shall be located to permit the registering of the temperature of the contents when the tank contains no more than 20% of its calibrated capacity.

(c) Farm bulk milk tanks will be equipped with easily accessible sampling ports or a sample cock.

(d) Farm bulk milk tanks shall comply with the "Grade A Pasteurized Milk Ordinance" which is adopted by reference in §217.2 of this title (relating to Grade A Pasteurized Milk Ordinance).

§217.63. Milk Tank Trucks.

(a) Each milk tank truck used to transport milk or milk products to or from a dairy farm, milk plant, or receiving station, shall be permitted by the department or by the authorized Regulatory Agency of another state. Failure to obtain a permit may result in the milk tank truck and its contents being immediately removed from Grade A or food use.

(b) All vehicles and milk tank trucks containing milk or milk products shall be legibly marked with the name and address of the milk plant or hauler in possession of the contents. The permit sticker issued by the department shall be placed near the outlet valve of the tanker truck or trailer.

(c) All milk tank trucks must be inspected prior to the issuance of a permit and a minimum of once each 12 months thereafter. The requirement for this annual inspection does not eliminate or supersede other licenses or permits required by any other official regulatory agency. The owner or manager of the milk transportation company will report verbally or in writing to the department, within ten days, any milk transport tanks taken out of service or severely damaged.

(d) Milk tank trucks must be operated in compliance with the following provisions.

(1) Permanently installed milk tank truck washing equipment must be in compliance with the current edition of the 3-A Sanitary Standards and Accepted Practices at the time of installation and be approved by the department. This equipment shall be so designed that it will properly clean and sanitize all milk-contact surfaces when connected to a cleaning system at an approved milk tank truck cleaning facility.

(2) Each bulk milk pickup tanker shall be provided with adequate space for sanitary storage, without overcrowding, of fittings,

valves, milk pumps, racks for milk conducting equipment, wrenches, sample bottles, dippers, solutions for washing and sanitizing milk contact equipment, and all other equipment used for milk handling and sampling purposes.

(3) When compartment milk tank trucks are used, Grade A milk shall not be permitted to be hauled in one compartment while ungraded milk or another product is being hauled in another compartment on the same tanker.

(4) Agitating and sampling milk in a milk tank truck shall be accomplished in such a manner as to provide maximum protection against product contamination. In no instance shall these activities be performed at a place other than a location approved by the department.

(5) Milk tank trucks may not be used to transport poisonous or toxic substances.

(6) Milk tank trucks transporting pasteurized milk or milk products that will not be re-pasteurized at the receiving milk processing plant shall not be used to transport raw milk, raw egg products, or any other product determined by the department to be a source of microbiological or chemical contamination.

§217.64. Unloading Stations and Milk Tank Truck Cleaning Facilities.

(a) Milk tank truck unloading stations.

(1) When the milk tank truck unloading station is a receiving station or a milk processing plant, it shall comply with the following sanitation requirements for Grade A pasteurized milk as specified in the "Grade A Pasteurized Milk Ordinance" which is adopted by reference in §217.2 of this title (relating to Grade A Pasteurized Milk Ordinance): floors; walls and ceilings; doors and windows; lighting and ventilation; toilet-sewage disposal facilities; water supply; hand-washing facilities; milk plant cleanliness; sanitary piping; construction and repair of containers and equipment; cleaning and sanitizing of containers and equipment; storage of cleaned containers and equipment; storage of single service containers, utensils, and materials; protection from contamination; cooling of milk; personnel cleanliness; and surroundings.

(2) When the unloading station is a transfer station, it shall comply with all the requirements of a receiving station except that the provisions for walls, ceilings, doors and windows are not required unless climatic and operation conditions interfere with safe handling of the milk. Overhead protection shall be provided in all cases.

(3) The pump-out of the milk tank truck shall be done in an area where a cover extends over the complete transport tank or, when climatic and operating conditions require, in a completely enclosed area. Pump-out operations must be protected in such a manner as to prevent product contamination. If the area is not completely enclosed or doors of the unloading area are open during unloading, a suitable filter is required for the manhole or the air inlet vent.

(4) The agitating and sampling of the transport tank milk shall be accomplished in such a manner as to provide maximum protection against product contamination. The unloading station shall provide the necessary equipment to adequately agitate the milk in the transport tank. The milk shall be agitated for a minimum of 15 minutes prior to obtaining samples. The department may approve alternative procedures to achieve adequate agitation. Samples shall be collected only by certified milk samplers. In no instance shall agitation and sampling be done at a place other than a location approved by the department.

(5) The unloading station shall record the following information on each load of milk received, and maintain these records for a period of not less than 90 days:

(A) the date the load was received;

(B) the time received;

(C) the number of pounds in the load;

(D) the temperature of the milk upon receipt;

(E) the permit number of the milk tank truck delivering the milk;

(F) the name of the station operator receiving the milk; and

(G) the manifest with the driver's license number of the sample collector.

(6) In no case shall milk be received from a milk tank truck that appears to be damaged, dirty, or does not have a current cleaning tag without the permission of the department.

(b) Milk Tank Truck Cleaning Facilities.

(1) It shall be the responsibility of each unloading station to provide a milk tank truck cleaning facility. The milk tank truck cleaning facility may be an integral part of the unloading station or a separate facility. When the milk tank truck cleaning facility is a separate facility, it shall be located convenient to and in the proximity of the unloading station. All milk tank trucks that transport milk and milk products as permitted by the department, shall be washed and sanitized at a permitted milk plant, receiving station, transfer station, or milk tank truck cleaning facility.

(2) The milk tank truck cleaning facility shall comply with the following sanitation requirements for Grade A pasteurized milk unloading stations of the "Grade A Pasteurized Milk Ordinance:" floors; walls and ceilings; doors and windows; lighting and ventilation; toilet-sewage disposal facilities; water supply; hand-washing facilities; milk plant cleanliness; sanitary piping; construction and repair of containers and equipment; cleaning and sanitizing of containers and equipment; storage of cleaned containers and equipment; storage of single service containers, utensils, and materials; protection from contamination; cooling of milk; personnel cleanliness; and surroundings.

(3) An unloading station which receives milk in milk tank trucks equipped with permanently installed tank washers will provide a milk tank truck cleaning facility equipped with the following:

(A) adequate water heating facilities;

(B) tanks of an adequate size to hold the rinse, wash, and sanitizing solution;

(C) a wash pump which will deliver the cleaning and sanitizing solution to the milk-contact surface of the milk tank truck at an adequate rate and velocity;

(D) a removal pump which will remove rinse and cleaning solutions from the milk tank truck as fast as such solutions are pumped into the milk tank truck;

(E) a screening device shall be provided which will prevent the passage of any foreign material into the system that would adversely affect the performance of the spray device(s), and located so as to be easily cleaned and sanitized;

(F) a temperature recorder which meets the applicable requirements of the most current revision of the "Grade A Pasteurized Milk Ordinance" shall be provided. In addition, a pressure indicator should be provided. These may be an integral unit or separate units. The temperature sensor should be located in the return solution line. The pressure sensor shall be located in the solution-rinse line downstream from the pressure supply pump. Recording charts shall be properly identified (showing date, permit number of transportation

tank cleaned, operator's initials, etc.) and kept on file for not less than 90 days;

(G) the necessary equipment shall be provided for the cleaning of transport tank pumps, gaskets, hoses, etc., which do not clean in place (CIP). Equipment shall be provided to clean the hoses by circulation of cleaning solution in conjunction with the clean-out-of-place (COP) vat that is equipped with a temperature recorder which meets the applicable requirements of the most current revision of the "Grade A Pasteurized Milk Ordinance;" however, if an integrated CIP system designed to clean transport tanker, milk pumps, gaskets, hoses and appurtenances, by circulation is provided, the following criteria must be met:

(i) a temperature recorder that complies with the applicable requirements of the most current revision of the "Grade A Pasteurized Milk Ordinance" and a pressure recorder shall be provided;

(ii) the extended tube holder for cleaning milk hoses and receiving hoses shall be of adequate length to accommodate hoses of 35 feet maximum length;

(iii) the CIP system shall provide a cleaning regimen for a pre-rinse, wash, post-rinse and sanitizing of the transport tanker, milk pumps, gaskets, hoses, receiving hose, and appurtenances;

(iv) the CIP system shall be capable of a minimum wash temperature of 135 degrees Fahrenheit and minimum circulation flow rate of five feet per second; and

(v) all equipment and utensils shall be in compliance with the standards outlined in the current edition of the 3-A Sanitary Standards and Accepted Practices at the time of installation;

(H) all equipment and utensils must be in compliance with the current edition of the 3-A Sanitary Standards and Accepted Practices at the time of installation; and

(I) a cleaning regimen shall be established and posted in the milk tank truck cleaning facility. This regimen shall provide for a pre-rinse and sanitizing of the milk tank truck. The wash solution must have a minimum temperature in the return line of 135 degrees Fahrenheit.

(4) The department may permit an unloading station to utilize a milk tank truck cleaning facility equipped only with portable tank washing equipment (drop in washers) or with the equipment and personnel necessary for manual tank cleaning, providing the station can demonstrate the capability of effectively cleaning and sanitizing the milk tank trucks. In no case will milk tank trucks equipped with installed tank washers be unloaded into said unloading stations without the permission of the department. This permission will be granted only in emergency situations.

(5) The milk tank truck and appurtenances shall be thoroughly cleaned after each use and all equipment shall be thoroughly cleaned at least once each day used. It is allowable to pick up multiple loads continuously within a 24-hour period, provided the milk tank truck is washed after each day's use.

(6) The milk tank truck and appurtenances shall be sanitized immediately after washing with an approved sanitizer. The milk tank truck shall be sanitized by pumping the sanitizing solution through the wash-rinse system. When the time elapsed after cleaning and sanitizing, and before its first use, exceeds 96 hours, the tank must be re-sanitized.

(7) A cleaning and sanitizing tag shall be affixed to the outlet valve of the milk tank truck until the milk tank truck is next washed and sanitized. When the milk tank truck is washed and sanitized, the previous cleaning and sanitizing tag shall be removed and stored at the location where the milk tank truck was washed for a period of not less than 15 days. The tag shall bear the following information:

(A) the milk tank truck permit number;

(B) the date and time it was cleaned and sanitized;

(C) the name and location of the cleaning station; and

(D) the name of the person who cleaned and sanitized the milk tank truck.

§217.65. Responsibilities of the Bulk Milk Hauler/Sampler.

Duties and responsibilities of the Bulk Milk Hauler/Sampler shall be in compliance with §217.2 of this title (relating to Grade A Pasteurized Milk Ordinance). In addition the Bulk Milk Hauler/Sampler shall:

(1) agitate the farm bulk milk tank for a minimum of ten minutes. Larger tanks may require more time; and

(2) deliver producer samples to designated place and personnel as approved by the department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
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SUBCHAPTER E. DAIRY PRODUCTS AND MILK FOR MANUFACTURING PURPOSES

25 TAC §§217.71 - 217.81

STATUTORY AUTHORITY

The new rules are authorized by Health and Safety Code, §12.0111, which requires the department to charge fees for issuing or renewing a license sufficient to recover costs; §12.0112, which requires the term of each license issued to be two years; Health and Safety Code, §§431.241, 435.009(c), and 440.006, which provide the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapters 431, 435, and 440; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The new rules affect the Health and Safety Code, Chapters 12, 431, 435, 440, and 1001; and Government Code, Chapters 531 and 2001.

§217.71. Permits.

Every manufacturer of dairy products located in the State of Texas, shall obtain a milk plant permit. Farms producing milk for manufacturing purposes shall obtain a producer dairy farm permit. Only a person

who complies with the requirements of these rules shall be entitled to receive and retain a permit.

§217.72. Inspection of Dairy Product Manufacturers.

(a) Each dairy product manufacturer located within the State of Texas shall be inspected by the department prior to the issuance of a permit. Following the issuance of a permit, each dairy product manufacturer shall be inspected at least once every three months. When the violation of any of the requirements set forth in §217.74 of this title (relating to Requirements for Milk Plants Producing Dairy Products) are found to exist, the violation will be brought to the attention of the dairy product manufacturer, and a second inspection shall be required after the time deemed necessary to remedy the violation, but not before the lapse of three days. This second inspection shall be used to determine compliance with the requirements of §217.74 of this title. Any violation of the same requirements of §217.74 of this title on the second inspection shall be the basis for permit suspension in accordance with §217.92 of this title (relating to Enforcement) and/or court action.

(b) One copy of the inspection report shall be provided to the operator, or other responsible person and be posted in a conspicuous place on an inside wall of the establishment. The inspection report shall not be defaced and shall be made available to the department upon request. An identical copy of the inspection report shall be filed with the records of the department.

(c) Every dairy product manufacturer, upon the request of the department, shall permit access of officially designated persons to all parts of their establishment or facilities to determine compliance with these rules. A distributor or milk plant operator shall furnish the department, upon request, a true statement of the actual quantities of milk and milk products purchased and sold.

(d) All plans for the construction, reconstruction, or alterations other than those to repair or perform maintenance on existing facilities of a dairy product manufacturer must be submitted to the department for approval before construction is begun.

(e) When a condition is found which constitutes an imminent health hazard, the department shall suspend the permit immediately. A dairy product manufacturer found violating any requirement must be notified in writing. The requirement of giving written notice shall be deemed to have been satisfied by the handing to the operator, or by the posting, of an inspection report, as required by this section. After receipt of a notice of violation, but before the allotted time has elapsed, the dairy product manufacturer shall have an opportunity to appeal or request an extension of the time allowed for correction.

§217.73. Raw Milk for Manufacturing Purposes.

(a) Raw milk for manufacturing purposes shall be produced from producer dairy farms that hold a valid Grade A permit. Dairies that are permitted to sell Grade A Raw Milk for Pasteurization, but have had their permit temporarily suspended because of violations of Grade A standards for bacterial count, somatic cell count, or added water may be eligible to sell milk for manufacturing purposes for a period not to exceed 14 days, provided that the most recent bacterial count of milk does not exceed 500,000 per milliliter.

(b) The appearance of acceptable raw milk shall be normal and free of sediment when examined visually or by test procedure. It shall not show any abnormal condition (including, but not limited to curdled, ropy, bloody or mastitic condition), as indicated by sight or other test procedures. The milk shall be free from objectionable feed and other off-odors. It shall be free of excessive sediment.

(c) Milk for manufacturing purposes shall not contain aflatoxin residues of 0.5 parts per billion or greater.

(d) Milk for manufacturing purposes shall contain no drug residues.

§217.74. Requirements for Milk Plants Producing Dairy Products.

(a) General requirements.

(1) Plant cleanliness. All rooms in which dairy products are handled, processed or stored, or in which containers, utensils and/or equipment are washed or stored, shall be kept clean, neat and free of evidence of insects and rodents. Only insecticides and rodenticides approved for use by the department and/or registered with the U.S. Environmental Protection Agency (EPA) shall be used for insect and rodent control. Only equipment directly related to processing operations or the handling of containers, utensils, and equipment shall be permitted in the pasteurizing, processing, cooling, condensing, drying, packaging, and bulk milk or milk product storage rooms. All piping, floors, walls, ceilings, fans, shelves, tables and the non-product-contact surfaces of other facilities and equipment shall be clean. No trash, solid waste or waste dry product shall be stored within the milk plant, except in covered containers. Excessive product dust shall be kept under effective control by the use of exhaust and collective systems designed for in-plant dust control. Tailings and materials collected from exhaust collective systems shall not be used for human consumption.

(2) Surroundings. The adjacent surroundings shall be free from refuse, rubbish, and waste materials to prevent harborage of rodents, insects, and other vermin. The premises shall be kept in a clean and orderly condition, and shall be free from strong or foul odors, or smoke. Construction and maintenance of driveways and adjacent plant traffic areas shall be of concrete, asphalt, or similar material to keep dust and mud to a minimum.

(3) Drainage. A suitable drainage system shall be provided which will allow rapid drainage of all water from plant buildings and driveways, including surface water around the plant and on the premises, and all such water shall be disposed of in such a manner as to prevent a nuisance or health hazard and in compliance with state, district, and local regulations.

(b) Buildings.

(1) The building or buildings shall be of sound construction and shall be kept in good repair to prevent the entrance or harboring of rodents, birds, insects, vermin, dogs, and cats. All service pipe openings through outside walls shall be sealed around the opening or provided with tight metal collars.

(2) All openings to the outer air shall be effectively protected by: screening or effective electric screen panels; fans or air curtains which provide sufficient air velocity so as to prevent the entrance of insects; properly constructed flaps where it is impractical to use self-closing doors or air curtains; or any effective combination of the above or by any other method which prevents the entrance of insects. All outer doors shall be tight and self-closing. Screen doors shall open outward. All outer openings shall be rodent-proofed to the extent necessary to prevent the entry of rodents.

(3) The walls, ceilings, partitions, and posts of rooms in which milk or dairy products are processed, manufactured, handled, packaged, or stored (except dry storage of packaged finished products and supplies) or in which utensils are washed and stored, shall be smooth with material that is light colored, resistant to moisture, and easy to keep clean.

(4) Floors.

(A) The floors of all rooms in which milk or dairy products are processed, manufactured, packaged, or stored or in which utensils are washed shall be constructed of tile laid with impervious joint

material, concrete, or other equally impervious material. The floors shall be smooth, kept in good repair, graded so that there will be no pools of standing water or milk products after flushing, and all openings to the drains shall be equipped with traps properly constructed and kept in good repair.

(B) Sound, smooth wood floors which can be kept clean, may be used in rooms where new containers and supplies and packaged finished products are stored.

(5) Lighting and ventilation.

(A) Adequate light sources shall be provided (natural, artificial or a combination of both) which furnish at least 20 foot-candles (220 lux) of light in all working areas. This shall apply to all rooms where milk or milk products are handled, processed, packaged, or stored; or where containers, utensils and/or equipment are washed. Dry storage and cold storage rooms shall be provided with at least five foot-candles (55 lux) of light.

(B) Ventilation in all rooms shall be sufficient to keep them reasonably free of odors and excessive condensation on equipment, walls and ceilings.

(C) Pressurized ventilating systems, if used, shall have a filtered air intake.

(D) For milk plants that condense and/or dry milk or milk products, ventilating systems in packaging rooms, where used, shall be separate systems and where possible have the ducts installed in a vertical position.

(6) Rooms and compartments.

(A) Pasteurizing, processing, reconstitution, cooling, condensing, drying, and packaging of milk and milk products shall be conducted in a single room, or separate rooms, but not in the same room used for the cleaning of milk cans, portable storage bins, bottles and cases, or the unloading and/or cleaning and sanitizing of milk tank trucks, provided that these rooms may be separated by solid partitioning doors that are kept closed. Cooling, either plate or tubular, may be done in the room where milk tank trucks are unloaded and/or cleaned and sanitized. Separation/clarification of raw milk may be done in an enclosed room where milk tank trucks are unloaded and/or cleaned and sanitized.

(B) Coolers and freezers. Coolers and freezers where dairy products are stored shall be clean, dry and maintained at a uniform temperature and humidity to protect the product from deterioration, and minimize the growth of mold. Circulation of air shall maintain uniform temperature and humidity at all times. Coolers and freezers shall be free from rodents, insects, and pests. Shelves shall be kept clean and dry. Refrigeration units shall have provisions for collecting and disposing of condensate.

(i) Bulk milk and milk products shall be handled and stored to maintain an internal temperature of 45 degrees F or below.

(ii) Packaged milk and milk products shall be handled and stored to maintain an internal temperature of 41degrees F or below.

(iii) Freezers shall be maintained so that frozen food remains frozen at all times.

(C) Supply rooms. The supply rooms used for the storing of packaging materials, containers, and miscellaneous ingredients shall be kept clean, dry, orderly, free from insects, rodents, and mold, and maintained in good repair. These items stored therein shall be adequately protected from dust, dirt, or other extraneous matter, and so arranged on racks, shelves, or pallets to permit access to the supplies and cleaning and inspection of the room. Insecticides, rodenticides and cleaning compounds shall be properly labeled and segregated, and stored in a separate room or cabinet away from milk, dairy products, ingredients, or packaging supplies.

(D) Boiler and tool rooms. The boiler and tool rooms shall be separated from other rooms where milk and dairy products are processed, manufactured, packaged, handled, or stored. The rooms shall be kept orderly and reasonably free from dust and dirt.

(E) Toilet and dressing rooms. Toilet facilities shall be provided and be conveniently located. Toilet rooms may not open directly into any room in which milk and/or milk products are processed, condensed or dried, and stored. Toilet rooms shall be completely enclosed and have tight-fitting, self-closing doors. Dressing rooms, toilet rooms, and fixtures are kept in a clean condition, in good repair and are well ventilated and well lighted. Toilet tissue and easily cleanable covered waste receptacles shall be provided in toilet rooms. All plumbing shall be installed to meet the applicable provisions of the state or local plumbing code. Sewage and other liquid wastes shall be disposed of in a sanitary manner, and non-water-carried sewage disposal facilities shall not be used.

(F) Starter facilities. Sanitary facilities shall be provided for the handling of starter cultures.

(7) Hand-washing facilities. Hand-washing facilities shall be provided, including hot and cold running water, soap or other detergents, and sanitary single-service towels or air dryers. The facilities shall be located in or adjacent to toilet and dressing rooms and also at such other places in the plant as may be essential to the cleanliness of all personnel handling products. Vats for washing equipment or utensils shall not be used as hand-washing facilities. Self-closing metal or plastic containers shall be provided for used towels and other wastes.

(8) Drinking water facilities. Drinking water facilities shall be provided in the plant and shall be conveniently located.

(c) Facilities.

(1) Water supply.

(A) Water for milk plant purposes shall be from an adequate supply, properly located, protected, and operated. It shall be easily accessible and of a safe, sanitary quality.

(B) The water supply shall be approved as safe by the State Water Control Authority and, in the case of individual water systems, complies with the specification outlined in Appendix D of the most current revision of the "Grade A Pasteurized Milk Ordinance" which is adopted by reference in §217.2 of this title (relating to Grade A Pasteurized Milk Ordinance), and the Bacteriological Standards outlined in Appendix G of the most current revision of the "Grade A Pasteurized Milk Ordinance."

(C) There shall be no cross-connection between the safe water supply and any unsafe or questionable water supply, or any source of pollution through which the safe water supply might become contaminated. A connection between the water supply piping and a make-up tank, such as for cooling or condensing, unless protected by an air gap or effective backflow preventer, constitutes a violation of this requirement. An approved air gap is defined as the unobstructed vertical distance through the free atmosphere of at least twice the diameter of the largest incoming water supply pipe or faucet to the flood level of the vessel or receptacle. The distance of the air gap is to be measured from the bottom of the potable inlet supply pipe or faucet to the top of the effective overflow, i.e., flood level rim or internal overflow, of the vessel. In no case, may the effective air gap be less than one inch (2.54 cm).

(D) Condensing water for milk or milk product evaporators, and water used to produce vacuum and/or to condense vapors in vacuum heat processing equipment, shall be from a source complying with subparagraph (B) of this paragraph. When approved by the department, water from sources not complying with subparagraph (B) of this paragraph, may be used when the evaporator or vacuum heat equipment is constructed and operated to preclude contamination of such equipment, or its contents, by condensing water or by water used to produce vacuum. Means of preventing such contamination are:

(i) use of a surface type condenser in which the condensing water is physically separated from the vapors and condensate; or

(ii) use of reliable safeguards to prevent the overflow of condensing water from the condenser into the evaporator. Such safeguards include a barometric leg extending at least 35 feet vertically from the invert of the outgoing condensing water line to the free level at which the leg discharges, or a safety shutoff valve, located on the water feed line to the condenser, automatically actuated by a control which will shut off the in-flowing water when the water level rises above a predetermined point in the condenser. This valve may be actuated by water, air or electricity, and shall be designed so that failure of the primary motivating power will automatically stop the flow of water into the condenser.

(E) Condensing water for milk or milk product evaporators, complying with subparagraph (D) of this paragraph, and water reclaimed from milk or milk products may be reused when all necessary means of protection are afforded and it complies with the procedures outlined in Appendix D, Part V of the most current revision of the "Grade A Pasteurized Milk Ordinance."

(F) New individual water supplies and water supply systems, which have been repaired or otherwise become contaminated, shall be disinfected before being placed in use. The supply shall be made free of the disinfectant by pumping to waste before any sample for bacteriological testing shall be collected.

(G) Samples for bacteriological testing of individual water supplies shall be taken upon the initial approval of the physical structure, each six months thereafter, and when any repair or alteration of the water supply system has been made. Samples shall be taken by the department and examinations shall be conducted in an official laboratory. To determine if water samples have been taken at the frequency established in this section, the interval shall include the designated six month period plus the remaining days of the month in which the sample is due.

(H) Current records of water test results are retained by the department.

(I) A potable water supply, which meets the criteria of this section, may be connected to the product feed line of a steam vacuum evaporator, provided that the water supply is protected at the point of connection by an approved backflow prevention device.

(2) Air under pressure which is in direct contact with milk and milk products and milk product-contact surfaces.

(A) Filter media. Air intake and pipeline filters shall consist of fiberglass with a downstream backing dense enough to prevent fiberglass breakoff from passing through cotton flannel, wool flannel, spun metal, electrostatic material, or other equally acceptable filtering media, which are non-shedding and which do not release to the air, toxic volatiles or volatiles which may impart any flavor or odor to the milk or milk product.

(B) Filter performance. Intake air filter efficiency shall be at least 98% using air cleaner coarse test dust. Final filter efficiency shall be at least 99% as measured by the Dioctylphthalate Fog Method (DOP) test (with a mean particle diameter of 0.3 microns). When commercially sterile air is required, the final filter efficiency shall be at least 99.99% as measured by the DOP test.

(C) Air supply equipment. The compressing equipment shall be designed to preclude contamination of the air with lubricant vapors and fumes. Oil-free air may be produced by one of the following methods or their equivalent:

(i) use of a carbon ring piston compressor;

(ii) use of oil-lubricated compressor with effective provision for removal of any oil vapor by cooling the compressed air; or

(iii) water-lubricated or non-lubricated blowers. The air supply shall be taken from a clean space or from relatively clean outer air and shall pass through a filter upstream from the compressing equipment. This filter shall be located and constructed so that it is easily accessible for examination and the filter media are easily removable for cleaning or replacing. The filter shall be protected from weather, drainage, water, product spillage, and physical damage.

(D) Moisture removal equipment. Air under pressure systems in excess of one bar, i.e., 103.5 kPa (15 psi), shall be provided with methods of moisture removal. The removal of moisture may be achieved by condensation and coalescing filtration or absorption, or equivalent, to prevent free water in the system. If it is necessary to cool the compressed air, an after-cooler shall be installed between the compressor and the air storage tank for the purpose of removing moisture from the compressed air.

(E) Filters and moisture traps. Filters shall be constructed so as to ensure effective passage of air through the filter media only. The coalescing filter and associated traps shall be located in the air pipeline downstream from the compressing equipment, and from the air tank, if one is used. The filter shall be readily accessible for examination, cleaning, and for replacing the filter media. The moisture trap shall be equipped with a petcock or other means for draining accumulated water. When coalescing filters are used, a means shall be provided to measure the differential pressure across the filter. The differential pressure device is required to indicate the need for filter media replacement. All coalescing filter housings shall be provided with a means of removing the condensed liquid from the filtration device. This can be accomplished by an automatic or manual drain installed on the base of the filter housing. The final filter media shall be disposable. The filter media shall be located in the air line upstream from, and as close as possible to, the point of application except that a final filter shall not be required where the compressing equipment is of a fan or blower type and operating at a pressure of less than one bar, i.e., 103.5 kPa (15 psi). Electronic air cleaners utilizing electrostatic precipitation principles to collect particulate matter may be used. Disposable filter media shall not be cleaned and reused.

(F) Air piping. The air piping from the compressing equipment to the filter and moisture trap shall be readily drainable. A milk or milk product check-valve of sanitary design shall be installed in the air piping, downstream from the disposable media filter, to prevent backflow of milk or milk product into the air pipeline, except that a check-valve shall not be required if the air piping enters the milk or milk product zone from a point higher than the milk or milk product overflow level, which is open to the atmosphere, or is for dry product applications, or for other dry application where liquids are not present. When a check-valve is not required, plastic or rubber or rubber-like tubing and suitable compatible fittings and connections made of plas-

tic or stainless steel may be used between the final filter and the point of application. Air distribution piping and fittings after the final filter shall be of corrosion-resistant materials. Air distribution piping, fittings and gaskets between the discharge of the sanitary check-valve to the processing equipment shall be sanitary piping.

(3) Culinary steam for milk and milk products. The following methods and procedures will provide steam of culinary quality for use in the processing of milk and milk products.

(A) Source of boiler feed water. Potable water or water supplies, acceptable to the department, shall be used.

(B) Feed water treatment. Feed water may be treated, if necessary, for proper boiler care and operation. Boiler feed water treatment and control shall be under the supervision of trained personnel or a firm specializing in industrial water conditioning. Such personnel shall be informed that the steam is to be used for culinary purposes. Pretreatment of feed waters for boilers or steam generating systems to reduce water hardness, before entering the boiler or steam generator by ion exchange or other acceptable procedures, is preferable to the addition of conditioning compounds to boiler waters. Only compounds complying with Title 21, Code of Federal Regulations (CFR), §173.310, may be used to prevent corrosion and scale in boilers, or to facilitate sludge removal. Amounts of the boiler water treatment compounds greater than the minimum necessary for controlling boiler scale or other boiler water treatment purposes shall not be used. No greater amount of steam than necessary shall be used for the treatment and/or pasteurization of milk and milk products. It should be noted that tannin, which is also frequently added to boiler water to facilitate sludge removal during boiler blow-down, has been reported to give rise to odor problems, and should be used with caution. Boiler compounds containing cyclohexylmine, morpholine, octadecylamine, diethylaminoethanol, trisodium nitrilotriacetae, and hydrazine shall not be permitted for use in steam in contact with milk and milk products.

(C) Boiler operation. A supply of clean, dry saturated steam is necessary for proper equipment operation. Boilers and steam generation equipment shall be operated in such a manner as to prevent foaming, priming, carryover and excessive entrainment of boiler water into the steam. Carryover of boiler water additives can result in the production of milk or milk product off-flavors. Manufacturers' instructions regarding recommended water level and blow-down should be consulted and rigorously followed. The blow-down of the boiler should be carefully watched, so that an over-concentration of the boiler water solids and foaming is avoided. It is recommended that periodic analyses be made of condensate samples. Such samples should be taken from the line between the final steam separating equipment and the point of the introduction of steam into the milk or milk product.

(4) Disposal of wastes. Dairy wastes shall be properly disposed of from the plant and premises. The sewer system shall have sufficient slope and capacity to readily remove all waste from the various processing operations. Where a public sewer is not available, all wastes shall be properly disposed of in a manner in compliance with local and state regulations. Containers used for the collection and holding of wastes shall be constructed of metal, plastic, or other equally impervious material and kept covered with tight-fitting lids and placed outside the plant on a concrete slab or on a rack raised at least 12 inches above the floor. Alternatively, waste containers may be kept inside an enclosed, clean, and fly-proof room. Solid wastes shall be disposed of at regular intervals to prevent the unsanitary accumulation of waste.

(d) Equipment and utensils - General construction, repair, and installation.

(1) All multi-use containers and equipment that milk and milk products come into contact with shall be of smooth, impervious, corrosion-resistant, non-toxic material shall be constructed for ease of cleaning and shall be kept in good repair. All single-service containers, closures, gaskets and other articles that milk and milk products come in contact with shall be non-toxic and shall have been manufactured, packaged, transported and handled in a sanitary manner. Articles intended for single-service use shall not be reused.

(2) All equipment and piping shall be designed and installed so as to be easily accessible for cleaning, and shall be kept in good repair, free from cracks and corroded surfaces. New or rearranged equipment shall be set away from any wall or spaced in such a manner as to facilitate cleaning and to maintain good housekeeping. All parts or interior surfaces of equipment, pipes (except certain piping cleaned in place) or fittings, including valves and connections, shall be accessible for inspection. Milk and dairy product pumps shall be of a sanitary type and easily dismantled for cleaning or shall be of approved construction to allow effective cleaning in place in accordance with 3-A Sanitary Standards.

(3) All CIP systems shall comply with the 3-A Sanitary Practices for permanently installed sanitary product, pipelines, and cleaning systems.

(4) All joints in containers, utensils and equipment shall be flush and finished as smooth as adjoining surfaces, or if the surface is vitreous, it must be continuous. Tile floors are not acceptable in dryers. Joints on equipment coming in contact with dry milk or milk products only or used for hot air piping may be sealed by other acceptable means. Where a rotating shaft is inserted through a surface with which milk or milk products come into contact, the joint between the moving and stationary surfaces shall be close fitting. Grease and oil from gears, bearings, and cables shall be kept out of the milk and milk products. Where a thermometer or temperature sensing element is inserted through a surface with which milk or milk products come into contact a pressure-tight seal shall be provided ahead of all threads and crevices.

(5) Can washers. Can washers shall have sufficient capacity and ability to discharge a clean, dry can and cover and shall be kept properly timed in accordance with the instructions of the manufacturer. The water and steam lines supplying the washer shall maintain a uniform pressure and be equipped with pressure regulating valves.

(6) Product storage tanks or vats. Storage tanks or vats shall be fully enclosed or tightly covered and well insulated. The entire interior surface, agitator and all appurtenances shall be accessible for thorough cleaning and inspection. Any opening at the top of the tank or vat including the entrance of the shaft shall be protected against the entrance of dust, moisture, insects, oil, or grease. The sight glasses, if used, shall be sound, clear, and in good repair. Vats which have hanged covers shall be so designed that moisture or dust on the surface cannot enter the vat when the covers are raised. If the storage tanks or vats are equipped with air agitation, the system shall be of an approved type and properly installed in accordance with the 3-A Accepted Practices for Supplying Air Under Pressure. Storage tanks or vats intended to hold product for longer than approximately eight hours shall be equipped with refrigeration and/or have insulation. All new storage tanks or vats shall meet the appropriate 3-A Sanitary Standards and shall be equipped with thermometers in good operating order.

(7) Surface coolers. Surface coolers shall be equipped with hinged or removable covers for the protection of the product. The edges of the fins shall be so designed as to divert condensate on non-product-contact surfaces away from product-contact surfaces. All gaskets or swivel connections shall be leak proof.

(8) Plate-type heat exchangers. Plate-type heat exchangers shall meet the 3-A Sanitary Standards for Construction and Installation. All gaskets shall be tight and kept in good operating order. Plates shall

be opened for inspection by the operator at sufficiently frequent intervals to determine if the equipment is clean and in good repair (e.g. free of dents, holes, broken gaskets and cracks). A cleaning regimen shall be posted to insure cleaning procedures between inspection periods.

(9) Internal return tubular heat exchangers. Internal return tubular heat exchangers shall meet the 3-A Sanitary Standards for Construction and Installation.

(10) Pumps. Pumps used for milk and dairy products shall be of the sanitary type and constructed to meet 3-A Sanitary Standards. Unless pumps are specifically designed for effective cleaning in place, they shall be disassembled and thoroughly cleaned after use.

(11) New equipment and replacements. New equipment and replacements, including all plastic parts, rubber and rubber-like materials for parts and gaskets having product-contact surfaces, shall meet the 3-A Sanitary Standards. If equipment or replacements are not approved by 3-A Sanitary Standards, such equipment and replacements shall meet the general requirements of this section.

(e) Personnel cleanliness. All employees shall wash their hands before beginning work and upon returning to work after using toilet facilities, eating, smoking, or otherwise soiling their hands. They shall keep their hands clean and follow good hygienic practices while on duty. Expectorating or use of tobacco in any form shall be prohibited in each room and compartment where any milk, dairy product, or supplies are prepared, stored, or otherwise handled. All persons shall wear clean outer garments while engaged in the handling, processing, storage, transporting, or packaging of dairy products. Clean outer garments shall also be worn by persons handling containers, utensils, and equipment used for these activities. Adequate hair coverings shall be worn by all persons engaged in receiving, testing, processing, packaging, or handling of dairy products.

(f) Personnel health. No person afflicted with a communicable disease shall be permitted in any room or compartment where milk and milk products are prepared, manufactured, or otherwise handled. No person who has a discharging or infected wound, sore or lesion on hands, arms, or other exposed portion of the body shall work in any dairy processing rooms or in any capacity which brings them into direct contact with associated milk or milk product-contact surfaces. Milk plant operators who have received verifiable and confirmed reports from or about employees who have these conditions and who have handled pasteurized milk or milk products or associated milk or milk product-contact surfaces, shall immediately report these facts to the department. Milk plant employees or applicants to whom a conditional offer of employment has been made shall be instructed by the milk plant that the employee or applicant is responsible to report to the milk plant management, in a manner that allows the milk plant to prevent the likelihood of the transmission of diseases that are transmissible through foods, if the employee or applicant:

(1) is diagnosed with an illness due to Hepatitis A virus, Salmonella typhi, Shigella species, Norovirus, Staphylococcus aureus, Streptococcus pyogenes, Escherichia coli 0157:H7, enterohemorrhagic Escherichia coli, enterotoxigenic Escherichia coli, Campylobacter jejuni, Entamoeba histolytica, Giardia lamblia, Non-typhoidal Salmonella, Rotovirus, Taenia solium, Yersinia enterocolitica, Vibrio cholerae O1 or other infectious or communicable disease that has been declared by the U.S. Secretary of Health and Human Services (HHS) to be transmissible to others through the handling of food, or has been clearly shown to be transmissible based upon verifiable epidemiological data; or

(2) is exposed to, or suspected of causing, a confirmed foodborne disease outbreak of one of the diseases specified in paragraph (1) of this subsection, including an outbreak at an event such as a family or communal meal, (e.g., church supper or ethnic festival) because the employee or applicant:

(A) prepared food implicated in the outbreak; or

(B) consumed food implicated in the outbreak; or

(C) consumed food at the event prepared by a person who is infected or ill.

(3) lives in the same household as a person who attends or works in a day care center, school or similar institution if the institution experiencing a confirmed outbreak of one of the diseases specified in paragraph (1) of this subsection. Similarly, milk plant employees shall be instructed by the milk plant management to report to the milk plant management if the employee, or applicant:

(4) has a symptom associated with acute gastrointestinal illness such as: Abdominal cramps or discomfort, diarrhea, fever, loss of appetite for three or more days, vomiting, jaundice; or

(5) has a pustular lesion such as a boil or infected wound that is:

(A) on the hands, wrists or exposed portions of the arms, unless the lesion is covered by a durable, moisture proof, tight-fitting barrier; or

(B) on other parts of the body if the lesion is open or draining, unless the lesion is covered by a durable, moisture proof, tight-fitting barrier.

(g) Raw product storage.

(1) All milk shall be held and processed under conditions and at temperatures that will avoid contamination and rapid deterioration. Raw milk in storage tanks within the dairy plant shall be handled in such a manner as to minimize bacterial increase and shall be maintained at 45 degrees Fahrenheit or lower until processing begins. This does not preclude holding milk at higher temperatures for a period of time, where applicable to particular manufacturing or processing practices.

(2) The bacteriological quality of commingled raw milk for use in dairy products for manufacturing purposes shall not exceed 500,000 per ml.

(3) During any consecutive six months, at least four samples of raw milk intended for use in manufactured milk products shall be taken by and examined by the department.

(h) Pasteurization. When pasteurization is required, or when a product is designated "pasteurized," every particle of the milk or milk product shall be subjected to such temperatures and holding periods in properly designed and operated equipment sufficient to ensure proper pasteurization of the product in accordance with the most current revision of the "Grade A Pasteurized Milk Ordinance." Provided, that nothing shall be construed as barring any other process found equivalent to pasteurization for milk and milk products, which has been recognized by FDA as provided in §343(h)(3) of the Federal Food, Drug and Cosmetic Act. Only such FDA recognized processes and no other shall be considered by the department.

(i) Composition and wholesomeness. All necessary precautions shall be taken to prevent contamination or adulteration of the milk or dairy products during manufacturing in accordance with these rules. All substances and ingredients used in the processing or manufacturing of any dairy product shall be subject to inspection and shall be wholesome and practically free from impurities.

(j) Cleaning and sanitizing treatment.

(1) All multi-use containers and utensils shall be thoroughly cleaned after each use and all equipment shall be thoroughly cleaned at least once each day used, unless the department has reviewed and accepted information, in consultation with FDA, supporting the cleaning of multi-use containers and utensils at frequencies extending beyond one day or 72 hours in the case of storage tanks, or 44 hours in the case of evaporators, which are continuously operated. Approval by the department will be conveyed in writing. Supporting information shall be submitted to and approved by the department prior to initiating the qualification period if required. Any significant equipment or processing changes shall be communicated to the department, and may result in a re-verification of the extended run proposal, if it is determined that the change could potentially affect the safety of the finished milk or milk product(s). The supporting information may include but is not limited to:

(A) statement of proposal, including desired cleaning frequency;

(B) product and equipment description;

(C) intended use and consumers;

(D) distribution and storage temperatures of product;

(E) diagram of process of interest;

(F) process parameters, including temperature and times;

(G) hazard evaluation and safety assessment; and

(H) review of equipment for sanitary design.

(2) When indicated by a hazard evaluation and safety assessment, a plan for initial qualification shall be developed to address identified critical process parameters.

(3) Storage tanks shall be cleaned when emptied and shall be emptied at least every 72 hours. Records must be available to the department to verify that milk storage in these tanks does not exceed 72 hours. These records shall be available for at least the previous three months or from the time of the last regulatory inspection, whichever is longer. Storage tanks, which are used to store raw milk or milk products or heat-treated milk products longer than 24 hours and silo tanks used for the storage of raw milk or milk products or heat-treated milk products shall be equipped with a seven day temperature recording device complying with the specifications of the most current revision of the Grade A Pasteurized Milk Ordinance.

(4) Evaporators shall be cleaned at the end of a continuous operation, not to exceed 44 hours, and records must be available to the department to verify that the operation time does not exceed 44 hours. Drying equipment, cloth-collector systems, packaging equipment and multi-use dry milk products and dry whey storage containers shall be cleaned at intervals and by methods recommended by the manufacturer and approved in writing by the department. Such methods may include cleaning without water by use of vacuum cleaners, brushes, or scrapers. After cleaning, such equipment is sanitized by a method approved in writing by the department. Cloth collector systems and all dry product-contact surfaces downstream from the dryer shall be sanitized or purged at intervals and by methods recommended by the manufacturer and approved by the department. Storage bins used to transport dry milk or milk products shall be dry cleaned after each usage and washed and sanitized at regular intervals.

(5) All milk tank trucks that transport milk and milk products shall be washed and sanitized at a permitted milk plant, receiving station, transfer station, or milk tank truck cleaning facility. The milk tank truck shall be cleaned and sanitized prior to its first use. When the time elapsed after cleaning and sanitizing, and before its first use, exceeds 96 hours, the tank must be re-sanitized. Whenever a milk tank truck has been cleaned and sanitized, as required by the department, it shall bear a tag or a record shall be made showing the date, time, place and signature or initials of the employee or contract operator doing the work, unless the milk tank truck delivers to only one receiving facility where responsibility for cleaning and sanitizing can be definitely established without tagging. The tag shall be removed at the location where the milk tank truck is next washed and sanitized and kept on file for 15 days.

(6) Pipelines and/or equipment designed for mechanical cleaning shall meet the following requirements.

(A) An effective cleaning and sanitizing regimen for each separate cleaning circuit shall be followed.

(B) A temperature recording device, complying with the most current revision of the Grade A Pasteurized Milk Ordinance, or a recording device which provides sufficient information to adequately evaluate the cleaning and sanitizing regimen which is approved by the department in writing, shall be installed in the return solution line or other appropriate area to record the temperature and time during which the line or equipment is exposed to cleaning and sanitizing solutions. For purposes of this section, recording devices which produce records not meeting the specifications of the most current revision of the "Grade A Pasteurized Milk Ordinance" may be acceptable if:

(i) the device provides a continuous record of the monitoring of the cleaning cycle time and temperature, cleaning solution velocity or cleaning pump operation and the presence or strength of cleaning chemicals for each cleaning cycle;

(ii) the record shows a typical pattern of each circuit cleaned, so that changes in the cleaning regimen may be readily detected; or

(iii) electronic storage of required cleaning records, with or without hard copy printouts, may be acceptable, provided, the electronically generated records are readily available. Electronic records must meet the criteria of this section and those provisions of with the most current revision of the Grade A Pasteurized Milk Ordinance, which are determined to be applicable by the department and FDA. Except that, electronic storage of required cleaning records, with or without hard copy, shall be acceptable, provided the computer and computer generated records are readily available and meet the criteria of this section and Title 21, CFR, Part 11.

(k) Packaging and labeling.

(1) Containers:

(A) The size, style, and type of packaging used for dairy products shall be packaged in materials which will cover and protect the quality of the contents during storage and regular channels of trade and under conditions of handling. The weights and shape within each size or style shall be as nearly uniform as is practical.

(B) Packaging materials for dairy products shall be selected which will provide sufficiently low permeability to air and vapor to prevent the formation of mold growth and surface oxidation. In addition, the wrapper shall be resistant to puncturing, tearing, cracking, or breaking under normal conditions of handling, shipping, and storage. When special-type packaging is used, the instructions of the manufacturers shall be followed closely as to its application and methods of closure.

(2) Packaging and repackaging. Packaging dairy products or cutting and repackaging all styles of dairy products shall be con-

ducted under rigid sanitary conditions. The atmosphere of the packaging rooms, the equipment and packaging material shall be free from mold and bacterial contamination. Methods for checking the level of contamination shall be as prescribed by the most current edition of "Standard Methods for the Examination of Dairy Products" of the American Public Health Association as defined in §217.1 of this title (relating to Definitions).

(3) Labeling. All commercial bulk packages containing dairy products manufactured under the provisions of this subpart shall be adequately and legibly marked with the name of the product, name and address of processor or manufacturer or other assigned plant identification, lot number, and any other identification as may be required by the department. Consumer packaged products shall be legibly marked with the name of the product, name and address of packer, manufacturer, or distributor.

(l) Storage of finished product.

(1) Dry storage. The product shall be stored at least 18 inches from the wall in aisles, rows, or sections and lots, in such a manner as to be orderly and easily accessible for inspection. Rooms should be cleaned regularly. Care shall be taken in the storage of any other product foreign to dairy products in the same room, in order to prevent impairment or damage to the dairy product from mold, absorbed odors, or vermin or insect infestation. Control of humidity and temperature shall be maintained at all times to prevent conditions detrimental to the product and container.

(2) Refrigerated storage. The finished product shall be placed on shelves, dunnage, or pallets and identified. It shall be stored under temperatures that will best maintain the initial quality. The product shall not be exposed to anything from which it might absorb any foreign odors or be contaminated by drippage or condensation.

§217.75. Supplemental Requirements for Plants Manufacturing, Processing and Packaging Instant Nonfat Dry Milk, Nonfat Dry Milk, Dry Whole Milk, Dry Buttermilk, Dry Whey, and Other Dry Milk Products.

(a) Sanitation and construction requirements. Facility and equipment shall be constructed and maintained in compliance with §217.74 of this title (relating to Requirements for Milk Plants Producing Dairy Products) and the most current revision of the "Grade A Pasteurized Milk Ordinance" which is adopted by reference in §217.2 of this title (relating to Grade A Pasteurized Milk Ordinance).

(b) Operations and operating procedures for pasteurization. All milk, buttermilk, and whey used in the manufacture of dry dairy products shall be pasteurized at the plant where dried, except that condensed whey and acidified buttermilk containing 40% or more solids may be transported to another plant for drying without repasteurization. When pasteurization is required, or when a product is designated "pasteurized," every particle of the milk or milk product shall be subjected to such temperatures and holding periods in properly designed and operated equipment to ensure proper pasteurization of the product in accordance with the most current revision of the "Grade A Pasteurized Milk Ordinance." Provided, that nothing shall be construed as barring any other process found equivalent to pasteurization for milk and milk products, which has been recognized by FDA as provided in §343(h)(3) of the Federal Food, Drug and Cosmetic Act. Only such FDA recognized processes and no other shall be considered by the department.

(c) Product adulteration. All necessary precautions shall be taken throughout the entire operation to prevent the adulteration of one product with another. The commingling of one type of liquid or dry product with another shall be considered an adulteration of both products. This does not prohibit the standardization of like products or the production of specific products for special uses provided labeling requirements are met as set forth in 21 Code of Federal Regulations, Parts 133 and 135.

(d) Checking quality. All milk products and dry milk products shall be subject to inspection and analysis by the dairy plant for quality and condition throughout each processing operation. Line samples shall be taken as an aid to quality control in addition to the regular routine analysis made on the finished products.

(e) Requirements for instant nonfat dry milk.

(1) Sampling and testing. All instant nonfat dry milk offered for sale shall be sampled and tested by the department routinely for the purpose of ensuring that the product meets requirements in accordance with the most current edition of "Standard Methods for the Examination of Dairy Products" of the American Public Health Association, as defined in §217.1 of this title (relating to Definitions).

(2) Requirements for instant nonfat dry milk.

(A) Flavor and odor. The flavor and odor shall be sweet, pleasing and desirable but may possess the following flavors to a slight degree:

(i) chalky;

(ii) cooked;

(iii) feed; or

(iv) flat.

(B) Physical appearance. The physical appearance shall possess a uniform white to light cream natural color and shall be free-flowing and free from lumps except those that readily break up with very slight pressure.

(C) Bacterial estimate. The standard plate count shall not be more than 30,000 per gram.

(D) Coliform count. The coliform count shall not be more than 10 per gram.

(E) Milkfat content. The milkfat shall not be more than 1.25%.

(F) Moisture count. The moisture shall not be more than 4.5%.

(G) Scorched particle content. Scorched particles shall not be more than 15 milligrams per gram.

(H) Solubility index. The solubility index shall not be more than 1 milliliter.

(I) Titratable acidity. The titratable acidity shall not be more than 0.15%.

(J) Dispersibility. The dispersibility shall not be less than 85%.

(K) Direct microscopic clump count. The direct microscopic clump count shall not be more than 75 million per gram.

§217.76. Supplemental Requirements for Plants Manufacturing, Processing, and Packaging Butter and Related Products.

(a) Rooms and compartments - Coolers and freezers. The coolers and freezers shall be equipped with facilities for maintaining temperature and humidity conditions to protect the quality and condition of the products during storage or during tempering prior to further processing. Coolers and freezers shall be kept clean, orderly, free from insects, rodents, and mold, and maintained in good repair. Coolers and freezers shall be adequately lighted and proper circulation of air shall

be maintained at all times. The floors, walls, and ceilings shall be of such construction as to permit thorough cleaning.

(b) Churn rooms. Churn rooms, in addition to meeting standards of proper construction and sanitation, shall be equipped to ensure that the air is kept free from odors and vapors by means of adequate ventilation and exhaust systems or air conditioning and heating facilities.

(c) Print and bulk packaging rooms. Rooms used for packaging print or bulk butter and related products shall, in addition to meeting standards of proper construction and sanitation, provide an atmosphere relatively free from mold (no more than 10 mold colonies per cubic foot of air), dust or other airborne contamination and be maintained at a reasonable room temperature.

(d) Equipment and utensils - General construction, repair, and installation. All equipment and utensils necessary to the manufacture of butter and related products shall meet the same general requirements as outlined in §217.74 of this title (relating to Requirements for Milk Plants Producing Dairy Products). In addition, the following requirements shall be met for other equipment.

(1) Continuous churn. All product-contact surfaces shall be of non-corrosive material. All nonmetallic product-contact surfaces shall comply with 3-A Standards for Plastic, Rubber, and Rubber-Like Materials. All product-contact surfaces shall be readily accessible for cleaning and inspection.

(2) Conventional churn. Churns shall be constructed of aluminum, stainless steel or equally corrosion-resistant metal, free from cracks, and in good repair. All gasket material shall be fat resistant, nontoxic and durable. Seals around the churn doors shall be tight.

(3) Bulk butter trucks, boats and packers. Bulk butter trucks, boats and packers shall be constructed of aluminum, stainless steel or equally corrosion-resistant metal free from cracks, seams and must have a surface that is smooth and easily cleanable.

(4) Butter, frozen or plastic cream melting machine. Shavers, shredders or melting machines used for rapid melting of butter, frozen or plastic cream shall be of stainless steel or equally corrosion-resistant metal, sanitary construction, and readily cleanable in accordance with 3-A Sanitary Standards.

(5) Printing equipment. All printing equipment shall be designed to be readily demountable for cleaning of product-contact surfaces. All product-contact surfaces shall be aluminum, stainless steel or equally corrosion-resistant metal, or plastic, rubber and rubber like material which meet 3-A Standards, except that conveyors may be constructed of material which can be properly cleaned and maintained in good repair.

(6) Brine tanks. Brine tanks used for the treating of parchment liners shall be constructed of non-corrosive material and have an adequate and safe means of heating the salt solution for the treatment of the liners. The tank shall also be provided with a drainage outlet.

(7) Starter vats. Bulk starter vats shall be of stainless steel or equally corrosion-resistant metal and constructed according to applicable 3-A Sanitary Standards. The vats shall be in good repair, equipped with tight-fitting lids, and have temperature controls.

(e) Operations and operating procedures for pasteurization. The milk or cream shall be pasteurized at the plant where the milk or cream is processed into the finished product.

(1) Cream for buttermaking. The cream for buttermaking shall be pasteurized at a temperature of not less than 165 degrees Fahrenheit for not less than 30 minutes or at a minimum temperature of not less than 185 degrees Fahrenheit for not less than 15 seconds. Provided, that nothing shall be construed as barring any other process found equivalent to pasteurization for milk and milk products, which has been recognized by the Food and Drug Administration (FDA) as provided in §343(h)(3) of the Federal Food, Drug and Cosmetic Act (FFDCA). Only such FDA recognized processes and no other shall be considered by the department.

(2) Cream for plastic or frozen cream. The pasteurization of cream for plastic or frozen cream shall be accomplished in the same manner as in subsection (a) of this section, except that the temperature for the vat method shall be not less then 170 degrees Fahrenheit for not less than 30 minutes, or not less than 190 degrees Fahrenheit for not less than 15 seconds. Provided, that nothing shall be construed as barring any other process found equivalent to pasteurization for milk and milk products, which has been recognized by FDA as provided in §343(h)(3) of the FFDCA. Only such FDA recognized processes and no other shall be considered by the department.

(f) Composition and wholesomeness. All ingredients used in the manufacture of butter and related products shall be subject to inspection and shall be wholesome and free from impurities. Chlorinating facilities shall be provided for butter wash water if needed, and all other precautions shall be taken to prevent contamination of products.

(g) Containers.

(1) Containers used for the packaging of butter and related products shall be containers or packaging material that will protect the quality of the contents in regular channels of trade. Caps or covers which extend over the lip of the container shall be used on all cups or tubs containing two pounds or less to protect the product from contamination during subsequent handling.

(2) Liners and wrappers.

(A) Supplies of parchment liners, wrappers, and other packaging material shall be protected against dust, mold, and other possible contamination.

(B) Prior to use, parchment liners for bulk butter packages shall be completely immersed in a boiling salt in a container constructed of stainless steel or other equally non-corrosive material. The liners shall be maintained in the solution for not less than 30 minutes. The solution should consist of at least 15 pounds of salt for every 85 pounds of water and shall be strengthened or changed as frequently as necessary to keep the solution full strength and in good condition.

(C) Other liners such as polyethylene shall be treated or handled in such a manner as to prevent contamination of the liner prior to filling.

(3) Filling bulk butter containers. The lined butter containers shall be protected from possible contamination prior to filling.

(4) Printing and packaging. Printing and packaging of consumer size containers of butter shall be conducted under sanitary conditions.

(5) General identification. Commercial bulk shipping containers shall be legibly marked with the name of the product, net weight, name and address of manufacturer, processor or distributor or other assigned plant identification (manufacturer's lot number, churn number, etc.). Packages of plastic or frozen cream shall be marked with the percent of milkfat.

(6) Storage of finished product in coolers. All products shall be kept under refrigeration at temperatures of 40 degrees Fahrenheit or lower after packaging and until ready for distribution or ship-

ment. The products shall not be placed directly on floors or exposed to foreign odors or conditions such as drippage due to condensation which might cause package or product damage.

(7) Storage of finished product in freezer.

(A) Sharp freezers. Plastic cream or frozen cream intended for storage shall be placed in quick freezer rooms immediately after packaging, for rapid and complete freezing within 24 hours. The packages shall be piled or spaced in such a manner that air can freely circulate between and around the packages. The rooms shall be maintained at -10 degrees Fahrenheit or lower and shall be equipped to provide sufficient high-velocity air circulation for rapid freezing. After the products have been completely frozen, they may be transferred to a freezer storage room for continued storage.

(B) Freezer storage.

(i) The room shall be maintained at a temperature of 0 degree Fahrenheit or lower. Adequate air circulation is desirable.

(ii) Butter intended to be held more than 30 days shall be placed in a freezer room as soon as possible after packaging. If not frozen before being placed in the freezer, the packages shall be spaced in such a manner as to permit rapid freezing and repiled, if necessary, at a later time.

§217.77. Supplemental Requirements for Plants Manufacturing and Packaging Cheese.

(a) Sanitation and construction requirements. Effective six months after adoption of these rules, facilities shall be constructed and maintained in compliance with §217.74 of this title (relating to Requirements for Milk Plants Producing Dairy Products). In addition, the following requirements shall be met.

(1) Rooms and compartments.

(A) Starter rooms. Starter rooms or areas shall be properly equipped and maintained for the propagation and handling of starter cultures. All necessary precautions shall be taken to prevent contamination of starter, of the room, equipment, and the air therein (such as filtered air, locked doors, and entry by only specified personnel).

(B) Make rooms. The rooms, or areas, in which the cheese is manufactured shall be of adequate size and the vats adequately spaced to permit movement around the vats and presses for proper cleaning and satisfactory working conditions. Adequate ventilation shall be provided.

(C) Drying rooms. If cheese is to be paraffined, a drying room, or area, of adequate size shall be provided to accommodate the maximum production of cheese during the flush period. Shelving and air circulation shall be provided for proper drying. Temperature and humidity control facilities shall be provided.

(D) Paraffining rooms. For rind cheese, a separate room or compartment shall be provided for paraffining and boxing the cheese. The room or compartment shall be of adequate size and the temperature maintained near the temperature of the drying room to avoid sweating of the cheese prior to paraffining.

(E) Rindless block wrapping area. For rindless blocks, a space shall be provided for proper wrapping and boxing of the cheese. The area shall be free from dust, condensation, mold or other conditions which may contaminate the surface of the cheese or contribute to an unsatisfactory packaging of the cheese.

(F) Coolers or curing rooms. Coolers, curing rooms, or areas where cheese is held for curing or storage shall be clean and maintained at the uniform temperature and humidity to protect the cheese. Circulation of air shall be maintained at all times. The rooms shall be free from rodents, insects, and pests. The shelves shall be kept clean and dry.

(G) Cutting and packaging rooms. When small packages of cheese are cut and wrapped, a separate room, or area, shall be provided for the cleaning and preparation of the bulk cheese. In addition, a separate room shall be provided for the cutting and wrapping operation. The rooms shall be well lighted, ventilated, and provided with filtered air. Air movement shall be outward to minimize the entrance of unfiltered air into the cutting and packaging room.

(2) Equipment and utensils--General construction, repair, and installation. All equipment and utensils necessary to the manufacture of cheese and related products shall meet the same general requirements as outlined in §217.74 of this title. In addition, for certain other equipment, the following requirements shall be met.

(A) Starter vats. Bulk starter vats shall be of stainless steel or equally corrosion-resistant metal and shall be in good repair, equipped with tight-fitting lids and have adequate temperature controls such as valves or indicating and/or recording thermometers. New vats shall be constructed according to the applicable 3-A Sanitary Standards.

(B) Cheese vats.

(i) The vats used for making cheese shall be of metal construction with adequate jacket capacity for uniform heating in accordance with 3-A Sanitary Standards. The inner liner shall be minimum 16-gauge stainless steel or other equally corrosion-resistant metal, properly pitched from side to center and from rear to front for adequate drainage. The liner shall be smooth, free from excessive dents or creases and shall extend over the edge of the outer jacket. The outer jacket, when metal, shall be constructed of stainless steel or other metal, which can be kept clean and sanitary. The junction of the liner and outer jackets shall be constructed to prevent milk or cheese from entering the inner jacket.

(ii) The vat shall be equipped with a suitable sanitary outlet valve. Effective valves shall be provided and properly maintained to control the application of heat to the vat.

(C) Mechanical agitators. The mechanical agitators shall be of sanitary construction. The carriage and track shall be constructed to prevent the dropping of dirt or grease into the vat. Metal blades, forks, or stirrers shall be constructed of stainless steel and of material approved in the 3-A Sanitary Standards for Plastic and Rubber or Rubberlike Materials, and shall be free from rough or sharp edges which might scratch the equipment or remove metal particles.

(D) Curd mill and miscellaneous equipment. Knives, hand rakes, shovels, paddles, strainers, and miscellaneous equipment shall be stainless steel or of material approved in the 3-A Sanitary Standards for Plastic and Rubberlike Material. The product-contact surfaces of the curd mill shall be of stainless steel. All pieces of equipment shall be so constructed that they can be kept clean. The wires in the curd knives shall be stainless steel, kept tight and replaced when necessary. All guards shall be in place.

(E) Hoops and followers. The hoops, forms, and followers shall be constructed of stainless steel, heavy tinned steel, or other approved suitable material in accordance with 3-A Sanitary Standards. If tinned, they shall be kept tinned and free from rust. All hoops, forms, and followers shall be kept in good repair. Drums or other special forms used to press and store cheese shall be clean and sanitary.

(F) Press. The cheese press shall be constructed of stainless steel, and all joints welded and all surfaces, seams, and open-

ings readily cleanable. The pressure device shall be the continuous type. Press cloths shall be maintained in good repair and in a sanitary condition. Single-service press cloths shall be used only once.

(G) Rindless cheese press. The press used to heat-seal the wrapper applied to rindless cheese shall have square interior corners, reasonably smooth interior surface and controls that shall provide uniform pressure and heat equally to all surfaces.

(H) Paraffin tanks. The metal tank shall be adequate in size, have wood rather than metal racks to support the cheese, heat controls, and an indicating thermometer. The cheese wax shall be kept clean.

(b) Operations and operating procedures.

(1) Cheese from pasteurized milk. When pasteurization is required, or when a product is designated "pasteurized," every particle of the milk or milk product shall be subjected to such temperatures and holding periods in properly designed and operated equipment to ensure proper pasteurization of the product in accordance with the most current revision of the U.S. Public Health Service, FDA, Grade A Pasteurized Milk Ordinance. Provided, that nothing shall be construed as barring any other process found equivalent to pasteurization for milk and milk products, which has been recognized by FDA as provided in §343(h)(3) of the Federal Food, Drug and Cosmetic Act. Only such FDA recognized processes and no other shall be considered by the department.

(2) Cheese from unpasteurized milk shall conform to the processing and aging requirements of the most current revision of Title 21, Code of Federal Regulations, Part 133.

(3) Whey disposal.

(A) Adequate sanitary facilities shall be provided for the disposal of whey. If outside, necessary precautions shall be taken to minimize flies, insects, and objectionable odors.

(B) Whey or whey products intended for human food shall at all times be handled in a sanitary manner in accordance with the procedures of this subpart as specified for handling milk and dairy products.

(4) Packaging and repackaging. Packaging rindless cheese or cutting and repackaging all styles of bulk cheese shall be conducted under sanitary conditions. The atmosphere of the packaging rooms, the equipment and the packaging material shall be free from mold and bacterial contamination.

(5) General identification. Each bulk cheese shall be legibly marked with the name of the product, code or date of manufacture, vat number, officially designated code number or name and address of manufacturer. Each consumer-sized container shall be plainly marked with the name and address of the manufacturer, packer or distributor, net weight of the contents, and name of product.

§217.78. Supplemental Requirements for Plants Manufacturing, Processing, and Packaging Pasteurized Process Cheese and Related Products.

(a) Equipment and utensils - General construction, repair, and installation. All equipment and utensils necessary to the manufacture of pasteurized process cheese and related products shall meet the same general requirements as outlined in §217.74 of this title (relating to Requirements for Milk Plants Producing Dairy Products). In addition for certain other equipment, the following requirements shall be met.

(1) Conveyors. Conveyors shall be constructed of material which can be cleaned, will not rust or otherwise contaminate the cheese, and maintained in good repair.

(2) Grinders or shredders. The grinders or shredders used in the preparation of the trimmed and cleaned natural cheese for the cookers shall be adequate in size. Product-contact surfaces shall be of corrosion-resistant material, and of such construction as to prevent contamination of the cheese and allow thorough cleaning of all parts and product-contact surfaces.

(3) Cookers. The cookers shall be the steam jacketed or direct steam type. They shall be constructed of stainless steel or other equally corrosion-resistant material. All product-contact surfaces shall be readily accessible for cleaning. Each cooker shall be equipped with an indicating thermometer and a temperature recording device. The recording thermometer stem may be placed in the cooker if satisfactory time charts are used; if not, the stem shall be placed in the hotwell or filler hopper. Steam check valves on direct steam type cookers shall be mounted flush with cooker wall, be constructed of stainless steel and designed to prevent the backup of product into the steam line, or the steam line shall be constructed of stainless steel pipes and fittings which can be readily cleaned. If direct steam is applied to the product, only culinary steam shall be used.

(4) Fillers. The hoppers of all fillers shall be covered, but the cover may have sight ports. If necessary, the hopper may have an agitator to prevent buildup on side walls. The filler valves and head shall be kept in good repair, capable of accurate measurements.

(b) Operations and operating procedures.

(1) Trimming and cleaning. Natural cheese shall be cleaned free of all nonedible portions. Paraffin and bandages as well as rind surface, mold, unclean areas, or any other part which could contaminate or adulterate the product, shall be removed.

(2) Cooking the batch. Each batch of cheese within the cooker, including the optional ingredients, shall be thoroughly commingled and the contents cooked at a temperature of at least 158 degrees Fahrenheit and held at that temperature for not less than 30 seconds. Care shall be taken to prevent the entrance of cheese particles or ingredients after the cooker batch of cheese has reached the final heating temperature. After holding for the required period of time, the hot cheese shall be emptied from the cooker as quickly as possible.

(3) Forming containers. Containers, either lined or unlined, shall be assembled and stored in a sanitary manner to prevent contamination in accordance with 3-A Sanitary Standards. The handling of containers by filler crews shall be done with extreme care and observance of personal cleanliness. Preforming and assembling of pouch liners and containers shall be kept to a minimum and the supply rotated to limit the length of time containers are exposed to possible contamination prior to filling.

(4) Filling containers. Hot fluid cheese from the cookers may be held in hot wells or hoppers to ensure a constant and even supply of processed cheese to the filler or slice former. Filler valves shall effectively measure the desired amount of product into the pouch or containers in a sanitary manner and shall cut off sharply without drip or drag of cheese across the opening. A system shall be used to maintain weight control. Damaged packages shall be removed from production. The cheese may be salvaged into sanitary containers and added back to cookers.

(5) Closing and sealing containers. Pouches, liners, or containers having product-contact surfaces after filling shall be folded or closed and sealed in a sanitary manner, preferably by mechanical means, to ensure against contamination. Each container shall be coded in such a manner to be easily identified as to date of manufacture by lot or sublot number.

§217.79. Supplemental Requirements for Plants Manufacturing, Processing, and Packaging Evaporated or Condensed Milk Products.

(a) Sanitation and construction requirements. Facility and equipment shall be constructed and maintained in compliance with §217.74 of this title (relating to Requirements for Milk Plants Producing Dairy Products), and the most current revision of the "Grade A Pasteurized Milk Ordinance" which is adopted by reference in §217.2 of this title (relating to Grade A Pasteurized Milk Ordinance). In addition, for certain other equipment, the following requirements shall be met.

(1) Evaporators and vacuum pans. All equipment used in the removal of moisture from milk or milk products for the purpose of concentrating the solids shall meet the requirements of the 3-A Sanitary Standards for Milk and Milk Products Evaporators and Vacuum Pans. All new or used replacements for this type of equipment shall meet the appropriate 3-A Sanitary Standards

(2) Fillers. Both gravity- and vacuum-type fillers shall be of sanitary design and all product-contact surfaces, if metal, shall be made of stainless steel or equally corrosion-resistant material; except that certain evaporated milk fillers having brass parts shall be approved by the department if free from corroded surfaces and kept in good repair. Nonmetallic product-contact surfaces shall meet the requirements for 3-A Sanitary Standards for Rubber and Rubberlike Materials or for Multiple-Use Plastic Materials. Fillers shall be designed so that they will contaminate or detract from the quality of the product being packaged.

(3) Batch or continuous in-container sterilizers shall be equipped with accurate temperature controls and effective valves to regulate the sterilization process. The equipment shall be maintained in such a manner to ensure control of the length of time of processing and to minimize the number of damaged containers.

(4) Homogenizers, where applicable, shall be used to reduce the size of the fat particles and to evenly disperse them in the product. New homogenizers shall meet the applicable 3-A Sanitary Standards.

(b) Operations and operating procedures regarding pasteurization. When pasteurization is required, or when a product is designated "pasteurized", every particle of the milk or milk product shall be subjected to such temperatures and holding periods in properly designed and operated equipment as will ensure proper pasteurization of the product in accordance with the most current revision of the "Grade A Pasteurized Milk Ordinance." Provided, that nothing shall be construed as barring any other process found equivalent to pasteurization for milk and milk products, which has been recognized by FDA as provided in §343(h)(3) of the Federal Food, Drug and Cosmetic Act. Only such FDA recognized processes and no other shall be considered by the department.

(c) Filling containers.

(1) The filling of small containers with product shall be done in a sanitary manner. The containers shall not contaminate or detract from the quality of the product. After filling, the container shall be hermetically sealed.

(2) Bulk containers for unsterilized product shall protect the product from contamination in storage or transit. The bulk container (including bulk tankers) shall be cleaned and sanitized before filling and filled and closed in a sanitary manner.

(d) Storage. Facilities shall be provided for the storage and handling of finished product.

§217.80. Drug Residue Monitoring.

Dairy Product Manufacturers shall test for drug residues in their incoming raw milk supply fulfilling all industry responsibilities as outlined in the most current revision of the "Grade A Pasteurized Milk Ordinance" which is adopted by reference in §217.2 of this title (relating to Grade A Pasteurized Milk Ordinance).

§217.81. Labeling.

(a) All bottles, containers and packages containing "milk" or "milk products" defined in §217.1 of this title (relating to Definitions) shall be labeled in accordance with the Title 21, Code of Federal Regulations, Subchapter B-Food for Human Consumption. In addition, except milk tank trucks, storage tanks and cans of raw milk from individual dairy farms, they shall be conspicuously marked with:

(1) The identity of the milk plant where pasteurized, ultra-pasteurized, aseptically processed, condensed and/or dried.

(2) The words "keep refrigerated after opening" for aseptically processed milk and milk products.

(3) The common name of the hooved mammal producing the milk shall precede the name of the milk or milk product when the product is from or is made from other than cattle's milk such as "Goat," "Sheep," "Water Buffalo," or "Other Hooved Mammal" milk or milk products respectively.

(4) The word "reconstituted" or "recombined" if the product is made by reconstitution or recombination.

(5) A code or lot number identifying the contents with a specific date, run, or batch of the product, and the quantity of the contents of the container.

(b) All vehicles and milk tank trucks containing milk or milk products shall be legibly marked with the name and address of the milk plant or hauler in possession of the contents. Milk tank trucks transporting raw, heat-treated or pasteurized milk and milk products to a milk plant from another milk plant, receiving station or transfer station are required to be marked with the name and address of the milk plant or hauler and shall be sealed. In addition, for each such shipment, a shipping statement shall be prepared containing at least the following information:

(1) shipper's name, address and permit number on the weight ticket or manifest;

(2) permit identification of hauler, if not an employee of the shipper;

(3) point of origin of shipment;

(4) tanker identification number;

(5) name of product;

(6) weight of product;

(7) temperature of product when loaded;

(8) date of shipment;

(9) name of supervising Regulatory Agency at the point of origin of shipment;

(10) whether the contents are raw, pasteurized, or in the case of cream, low fat or skim milk, whether it has been heat-treated;

(11) seal number on inlet, outlet, wash connections and vents; and

(12) grade of product.

(c) All cans of raw milk from individual dairy farms shall be identified by the name or number of the individual milk producer. Each

milk tank truck containing milk shall be accompanied by documentation, weigh ticket or manifest.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER F. PERMITS, FEES AND ENFORCEMENT

25 TAC §217.91, §217.92

STATUTORY AUTHORITY

The new rules are authorized by Health and Safety Code, §12.0111, which requires the department to charge fees for issuing or renewing a license sufficient to recover costs; §12.0112, which requires the term of each license issued to be two years; Health and Safety Code, §§431.241, 435.009(c), and 440.006, which provide the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapters 431, 435, and 440; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The new rules affect the Health and Safety Code, Chapters 12, 431, 435, 440, and 1001; and Government Code, Chapters 531 and 2001.

§217.91. Milk Facilities and Operations Permit and Frozen Dessert License Procedures.

(a) Permit/license required. A current permit/license is required for every dairy farm, milk plant, receiving station, transfer station, raw for retail milk dairy farm, milk tank truck, dairy product manufacturer, and frozen dessert manufacturer located and operating in the State of Texas. Every milk plant and frozen dessert manufacturer that imports milk, milk products, or frozen desserts into the State of Texas is required to obtain a current permit/license. Permits are issued for a two-year term.

(1) All dairy farm, milk plant, receiving station, transfer station, raw for retail milk dairy farm, milk tank truck, dairy product manufacturer, and frozen dessert manufacturer, and operations located in Texas shall be approved by the department based on an inspection prior to the issuance of a permit.

(2) Permit or license fees once submitted are non-refundable.

(3) A current permit or license shall only be issued when all past due fees (including inspection fees under subsection (h) of this section) and late fees have been paid for all years of operation in Texas.

(b) Application. Applications may be obtained by visiting the Department of State Health Services at 8407 Wall Street, Austin, Texas or by contacting the Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347. Applications are also available on-line at www.dshs.state.tx.us/fdlicense. The applicant must submit an accurate and complete application accompanied with a permit or license fee payable to the department prior to an inspection.

(c) Permit/license fees.

(1) Permitted or licensed facilities and operations shall pay the following fees. If applications are made after March 1 of any year, the fee will be prorated.

(A) Milk plant:

(i) $800 for a two-year license;

(ii) $600 pro-rated; and

(iii) $400 for a two-year license that is amended during the current licensure period due to minor change.

(B) Producer dairy farm:

(i) $200 for a two-year license;

(ii) $150 pro-rated; and

(iii) $100 for a two-year license that is amended during the current licensure period due to minor change.

(C) Receiving and transfer station:

(i) $800 for a two-year license;

(ii) $600 pro-rated; and

(iii) $400 for a two-year license that is amended during the current licensure period due to minor change.

(D) Milk transport tanker:

(i) $200 for a two-year license;

(ii) $150 pro-rated; and

(iii) $100 for a two-year license that is amended during the current licensure period due to minor change.

(E) Grade A raw for retail:

(i) $800 for a two-year license;

(ii) $600 pro-rated; and

(iii) $400 for a two-year license that is amended during the current licensure period due to minor change.

(F) Frozen dessert manufacturers:

(i) $800 for a two-year license;

(ii) $600 pro-rated; and

(iii) $400 for a two-year license that is amended during the current licensure period due to minor change.

(G) Dairy product manufacturer:

(i) $800 for a two-year license;

(ii) $600 pro-rated; and

(iii) $400 for a two-year license that is amended during the current licensure period due to minor change.

(2) For all applications and renewal applications, the department is authorized to collect subscription and convenience fees in

amounts determined by the Texas Online Authority to recover costs associated with application and renewal application processing through Texas Online.

(d) Renewal of a permit/license.

(1) Milk plants, producer dairy farms, receiving and transfer stations, Grade "A" raw for retail, dairy product manufacturer, and frozen dessert manufacturers must submit a renewal application and the required fee prior to September 1 of the year before the permit license expires. A person who submits a renewal application and required fee after the expiration date shall pay an additional $100 as a delinquency fee.

(2) Milk transport tankers must submit a renewal application and required fee prior to September 1 of the year before the permit license expires. All tankers shall have an inspection no more than one year old on file prior to issuance of the renewal permit sticker.

(3) Milk plants, Grade "A" raw for retail, and frozen dessert manufacturers' permit or license shall only be issued when all past due inspection fees are current.

(e) Amendment of permit/license.

(1) Fee. A permit/license that is amended for a change of name or a change in location of a permitted place of business will require submission of an application for amendment, and the required fee for the "minor change" amendment pursuant to subsection (c) of this section.

(2) Change of ownership. A permit is not transferable and will require submission of a new application and fee as outlined in subsection (c) of this section.

(3) The department must be notified in writing at least 30 days prior to the effective date of the name, ownership, or location change and will require submission of a new application and two-year license as outlined in subsection (a) of this section.

(f) All applicants shall comply with Subchapter T, §1.301 of this title (relating to Suspension of License for Failure to Pay Child Support).

(g) Applicability of other law.

(1) Health and Safety Code (HSC), Chapter 431, applies to the conduct of a person licensed under HSC, Chapter 440, and to a frozen dessert, a product sold in semblance of a frozen dessert, or a mix for one of those products subject to HSC, Chapter 440. A frozen dessert, a product sold in semblance of a frozen dessert, or a mix for one of those products is a "food" for purposes of HSC, Chapter 431.

(2) A person who holds a license under HSC, Chapter 440, related to the manufacturing of a product regulated under that chapter, and is engaging in conduct within the scope of that license, is not required to hold a license as a food manufacturer, food wholesaler, or warehouse operator under HSC, Chapter 431, Subchapter J.

(3) Health and Safety Code, Chapter 431, applies to the conduct of a person licensed under HSC, Chapter 435, and to milk or a milk product subject to HSC, Chapter 435. Milk or a milk product is a "food" for purposes of HSC, Chapter 431.

(4) A person who holds a license under HSC, Chapter 435, related to the processing, producing, bottling, receiving, transferring, or transporting of Grade "A" milk or milk products, or dairy products, and who is engaging in conduct within the scope of that permit, is not required to hold a license as a food manufacturer, food wholesaler, or warehouse operator under HSC, Chapter 431, Subchapter J.

(h) Inspection fees.

(1) All milk or milk products processed, manufactured, or bottled by milk plants, and offered for sale within the State of Texas shall be assessed a $0.045 per hundredweight inspection fee or shall pay a minimum fee of $5 each month, whichever is greater. This fee shall be assessed on a monthly basis. The inspection fee includes the cost of analyzing samples for milk or milk products. Milk plants shall submit monthly production data to the department no later than 15 days after the end of each reporting month as designated by the department, accompanied by the fee required by this section. Each milk plant is required to furnish, upon request from the department, production records for the preceding three years for auditing purposes. This fee shall be considered delinquent if it is not received by the department within 30 days after the end of the reporting period.

(2) All frozen desserts manufactured by frozen dessert manufacturing plants and offered for sale within the State of Texas shall be assessed a $0.015 per hundredweight inspection fee or shall pay a minimum fee of $5 each month, whichever is greater. This fee shall be assessed on a monthly basis. The inspection fee includes the cost for analyzing frozen dessert samples. Manufacturers shall submit monthly production data to the department no later than 15 days after the end of each monthly reporting period designated by the department, accompanied by the required fee. Also, each plant will be required to furnish, upon request, production records for the preceding three years for auditing purposes. This fee shall be considered delinquent if it is not received by the department within 30 days after the end of the reporting period.

(3) All dairy products manufactured in Texas shall be assessed a $0.015 per hundredweight inspection fee or shall pay a minimum fee of $5 each month, whichever is greater. This fee shall be assessed on a monthly basis. The inspection fee includes the cost for analyzing samples. Manufacturers shall submit monthly production data to the department no later than 15 days after the end of each monthly reporting period designated by the department, accompanied by the required fee. Also, each plant will be required to furnish, upon request, production records for the preceding three years for auditing purposes. This fee shall be considered delinquent if it is not received by the department within 30 days after the end of the reporting period.

§217.92. Enforcement.

(a) Tagging unsanitary equipment, utensils, and rooms. The department representative may attach a tag or other appropriate marking device to any equipment, utensil, or room in a dairy farm, milk plant, receiving station, transfer station, raw for retail dairy farm, milk tank truck, or frozen dessert manufacturer that the representative determines is unsanitary or is a health hazard. No equipment, utensil, or room so tagged shall be used until a department representative removes the tag following adequate cleaning and sanitization. Such tag shall not be removed by anyone other than a department representative.

(b) Detained products. A department representative shall attach a tag or other appropriate marking device to any milk, milk product, dairy product, frozen dessert, Grade A retail raw milk, or Grade A retail raw milk product that is or is suspected of being adulterated or misbranded. The tag indicates notice that the product is detained. No person shall remove the tagged products from the premises or dispose of the product by sale or otherwise without prior written approval from the department or a court order.

(c) Suspension of Health and Safety Code (HSC), Chapter 435, permit. The department may suspend a permit issued under HSC, Chapter 435, whenever there is reason to believe that a public health hazard exists, or whenever a permit holder has violated any of the sections of this chapter, or whenever the permit holder has interfered with the department or its agents in the performance of its duties. A written notice of the violation will be provided to the permit holder,

and the permit holder shall have 72 hours to correct the violation(s). The written notice may be served by a copy of the inspection report handed to the permit holder or operator or may be posted at the place of business. After receipt of the notice, but prior to the expiration of the 72 hours, the permit holder may request an extension of the time to correct the violation(s). The permit holder who has been served with a written notice of violation and suspension may request an informal regulatory conference on the facts of the violation. The informal regulatory conference shall be held within 72 hours of the request, notwithstanding any time allotted for correction. A permit holder who disagrees with the outcome of an informal regulatory conference may make a written request for a hearing. The hearing will be conducted pursuant to §§1.21, 1.23, 1.25, and 1.27 of this title (relating to Formal Hearing Procedures) and the Administrative Procedure Act, Government Code, Chapter 2001.

(d) Immediate suspension of HSC, Chapter 435, permit. Immediate suspension of a permit under this subsection shall occur when the milk or milk product involved creates, or appears to create, an imminent hazard to the public health; or in any case of a willful refusal to permit an inspection; or when the bacteria counts, coliform counts, somatic cell counts or cooling temperatures are in violation of the requirements of §217.27(e) of this title (relating to Examination of Milk and Milk Products), §217.28 of this title (relating to Standards for Grade A Raw for Retail Milk and Milk Products), or §217.45 of this title (relating to Examination and Standards for Frozen Desserts); or when adulteration by inhibitors or water is identified; or if any pathogenic bacteria is isolated. A permit that is immediately suspended shall remain suspended until the department determines that the violation has been corrected. The permit holder may make a written request for a hearing to contest the suspension. The hearing will be conducted pursuant to §§1.21, 1.23, 1.25, and 1.27 of this title and the Administrative Procedure Act, Government Code, Chapter 2001.

(e) Revocation of HSC, Chapter 435, permits. The department may revoke a permit issued under HSC, Chapter 435, if the permit holder is delinquent in the remittance of the permit fee or the inspection fee. The department may revoke a permit for noncompliance with the requirements of this chapter. The department will provide written notice of the reasons for the proposal to revoke, and the opportunity to request a hearing. The permit holder may make a written request for a hearing within 20 days of receipt of the written notice proposing revocation. The permit holder may also request an informal hearing conference without waiving the right to a hearing. The hearing will be conducted pursuant to §§1.21, 1.23, 1.25, and 1.27 of this title and the Administrative Procedure Act, Government Code, Chapter 2001.

(f) Denial, suspension, and revocation of license issued under frozen desserts, HSC, Chapter 440. The department may deny an application for a license, may suspend a license, or may revoke a license issued under HSC, Chapter 440, for violations of HSC, Chapter 440, or these sections. The license holder may request a hearing in writing to contest the denial, suspension, or revocation. The license holder may also request an informal hearing conference without waiving the right to a hearing. The hearing will be conducted pursuant to §§1.21, 1.23, 1.25, and 1.27 of this title and the Administrative Procedure Act, Government Code, Chapter 2001.

(g) Election of penalties. The penalty authorized by HSC, Chapter 435, is subject to either the sanctions prescribed in the "Grade A Pasteurized Milk Ordinance" which is adopted by reference in §217.2 of this title (relating to Grade A Pasteurized Milk Ordinance) for products covered by the "Grade A Pasteurized Milk Ordinance," or any civil or administrative penalty sanctions otherwise imposed by HSC, Chapter 431, or sanctions found in other law for products not covered by the Grade A Pasteurized Milk Ordinance.

(h) Administrative penalties. For products not covered by the "Grade A Pasteurized Milk Ordinance," administrative penalties, as provided in the Health and Safety Code, §§431.054 - 431.058, and in §229.261 of this title (relating to Assessment of Administrative Penalties), may be assessed against a person who violates HSC, Chapter 435 or 440, this chapter or a rule or order adopted under this chapter, who holds a permit or license under HSC, Chapter 435 or 440, or who is regulated under this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING
SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §§15.2, 15.3, 15.6 - 15.9, 15.14 - 15.16

The General Land Office (GLO) proposes amendments to §15.2 (relating to Definitions) to revise the meaning of small and large scale construction and dune restoration and §15.3 (relating to Administration) to provide for review periods for large and small scale construction, standard and expedited periods for review of local government beach and dune plans by the GLO, requirements for establishment of a dune protection line, and determination of the line of vegetation by the GLO necessary for establishing the boundary of the public beach easement. The GLO proposes an amendment to §15.6 (relating to Concurrent Dune Protection and Beachfront Construction Standards) to allow the use of fibercrete in certain areas. The GLO proposes an amendment to §15.7 (concerning Local Government Management of the Public Beach) to allow the use of a golf cart on a pedestrian beach for the transportation of a person with a disability. The GLO proposes an amendment to §15.8 (relating to Beach User Fees) in order to add provisions relating to beach access for disabled persons and to provide a technical correction changing the use of bank accounts to revenue accounts, consistent with current accounting practices. The GLO proposes amendments to §15.9 (relating to Penalties) concerning the amount and conditions for assessment of civil penalties, the addition of administrative penalties, the addition of remedial orders for dune restoration, and the removal of certain structures from the public beach. The GLO also proposes new §§15.14, 15.15, and 15.16 relating to the authority of the Commissioner of the GLO (Commissioner) to determine when a structure is an imminent hazard to public health or safety or interferes with public access to the beach, and to establish rules in determining whether a structure on the

public beach is not insurable property eligible for coverage under the Texas Windstorm Insurance Program.

BACKGROUND AND SECTION-BY-SECTION ANALYSIS OF PROPOSED RULES

§15.2 Definitions

The 80th Legislature enacted House Bill (HB) 2819 (Acts 2007, 80th Leg., Ch. 1256, eff. Sept. 1, 2007) which amended §61.015(c) of the Open Beaches Act (Texas Natural Resources Code §§61.001 - 61.026) and §63.056(a) of the Dune Protection Act (Texas Natural Resources Code §§63.001 - 63.1814) to allow a 30-day period for review of development plans for large-scale construction, described as construction activity that includes greater than 5,000 square feet or habitable structures greater than two stories in height. The longer period of review applies if either of these thresholds is exceeded. The previous 10-day period for review of development plans was maintained for review of development plans for small scale construction, described as construction activity that includes less than or equal to 5,000 square feet or habitable structures less than or equal to two stories in height. HB 2819 also amended §63.002 of the Dune Protection Act to define restoration as the repair or replacement of dunes or dune vegetation. An amendment to §15.2 is proposed to conform the definitions of large and small-scale construction in the rules to these statutory changes and to amend the definition for restoration. The definitions of large and small scale construction also clarify that both the area beneath the lowest habitable level of an elevated structure and a cupola (i.e. "widow's walk") on the top of the second habitable story of 400 square feet or less are not considered stories for the purpose of this section.

§15.3 Administration

HB 2819 also amended §61.011(d)(8) and §61.020(b) of the Open Beaches Act to authorize the Commissioner to establish rules for determining the line of vegetation (LOV) or natural LOV, and to provide that the Commissioner's determination of the LOV constitutes prima facie (legally sufficient) evidence of the landward boundary of the area subject to the public easement until a court adjudication establishes the line in another place. The proposed amendments to §15.3(b) include procedures for ensuring that identification of the LOV submitted by local governments and applicants for beachfront construction certificates is verified by the GLO in a manner consistent with statutory requirements provided in §61.016 and §61.017 of the Open Beaches Act. These procedures will also require individuals seeking a LOV determination for the purpose of evaluating the suitability of property for purchase or construction to submit LOV determination requests to the local government for review prior to submission to the GLO. Local government involvement in a preliminary determination is desirable because they are informed by knowledge of local conditions. However, the preliminary determination by the local government must be submitted to the GLO for review and approval. A preliminary determination by the local government is unnecessary if the Commissioner has issued a temporary standard for demarcation of the landward boundary of the public beach as part of a disaster recovery order under §15.13 of this title (relating to Disaster Recovery Orders). The response of the GLO for review of a determination of the LOV submitted with an application for a beachfront construction certificate or dune protection permit is subject to the same time periods for review of the permit or certificate. It is the intent of the GLO to respond to requests for review of LOV determinations not related to construction within 30 working days.

Section 63.121 of the Dune Protection Act authorizes the Commissioner to establish rules for the identification and protection of critical dune areas that are essential to the protection of state-owned land, public beaches, and submerged land. Local governments must use these rules to establish dune protection lines, as specified in §63.011(a) of the Dune Protection Act. Natural forces due to storms and erosion and the modification of these forces by development practices such as construction of concrete walls, roads, and the elimination of dunes underneath buildings lead to changes in natural dune fields. In addition, recent Hurricanes Rita, Dolly, and Ike demonstrate the ability of storms to restructure dune fields. Current rules require local governments to review its dune protection line every five years and within 90 days after a tropical storm or hurricane affects the portion of the coast within its jurisdiction. Texas Natural Resources Code §33.607 as amended by HB 2819 and HB 2073 (Acts 2009, 81st Leg., ch. 14, §2, eff. Sept. 1, 2009) authorizes local governments subject to Chapters 61 and 63 to establish and implement a plan for reducing public expenditures for erosion and storm damage losses to public and private property that may include the establishment and implementation of a building set-back line at the discretion of the local government. Section 33.607(f)(3) provides that the building set-back line be established no further landward than the dune protection line established under Texas Natural Resources Code, Chapter 63. Therefore, local governments should consider implementation of local erosion response plans in determining the location of the dune protection line, particularly after modification of the dune fields after storms. The GLO proposes to amend rules in §15.3(f) to ensure that a local government's establishment or alteration of dune protection lines includes protection of critical dune areas from erosion caused by natural forces and development by placing it sufficiently landward to allow establishment and implementation of an erosion response plan that may include a building set-back line.

HB 2819 amended §61.011(d) and §61.015(b) of the Open Beaches Act to authorize the Commissioner to establish rules for expedited review of beach access and use plans and to change the time period for plan review from 60 days to 90 days. The GLO proposes to amend §15.3(o) to provide three levels of plan review: a 30-day review period for plan amendments that do not contain variances or substantially alter beach access or dune protection; a 60-day review period for plan amendments that do not include changes to beach user fees, changes to beach access points, changes to vehicular access, or substantial alteration of beach access or dune protection; and a 90-day review period if beach user fees, beach access points, or vehicular access are changed and/or beach access and dune protection is substantially altered. The local government will be required to justify applications for 30- and 60-day review periods. The proposed changes also eliminate references to the role of the attorney general's office in local government plan review based upon changes by the 78th Legislature to §61.015 of the Open Beaches Act, contained in HB 1547 (Acts 2003, 78th Leg., ch. 245, §2, eff. June 18, 2003).

HB 2819 amended §63.121(b)(2) of the Dune Protection Act to require certification by the Commissioner of local government procedures and requirements governing the review and approval of dune protection permits. Prior to amendment by HB 2819, the Open Beaches Act and the Dune Protection Act limited the GLO to a review period of 10 working days for beachfront construction certificates and dune protection permits for both large- and small-scale construction. HB 2819 amended §61.015(c) of the Open Beaches Act and §63.056(a) of the Dune Protection Act

to require the commissioner's court or governing body of a municipality to send the Commissioner notice of the hearing and a copy of the certificate or permit application for large-scale construction for review and comment not less than 30 working days before the date of the public hearing. Section 15.3(s) is amended to incorporate the new 30 working day comment period by the GLO for beachfront construction certificates and dune protection permits applicable to large-scale construction.

§15.6 Concurrent Dune Protection and Beachfront Construction Standards

Several local jurisdictions including Galveston County, the City of Galveston, the Village of Jamaica Beach, and Brazoria County have local dune protection and beach access plans that include a variance approved by the GLO allowing the use of unreinforced fibercrete in 4 foot by 4 foot sections, 4 inches thick separated by expansion joints beneath the footprint of the habitable structure in the area located between 25 feet from the landward toe of the dunes and 200 feet landward of the line of vegetation. Hurricane Ike hit the upper Texas coast on September 13, 2008, as a strong Category 2 hurricane, preceded by extremely high water, including storm surge and battering waves. The wind and water impacts of Ike on coastal Brazoria County, Galveston Island, and Bolivar Peninsula were catastrophic. The tidal surge associated with Ike washed away sand from beaches and dunes, in some cases obliterating dunes and the natural line of vegetation. In areas where fibercrete was used as allowed by these variances, it appears that it did not contribute to damage to structures and cleanup was facilitated by the 4-foot by 4-foot dimensions as its proponents have suggested. Therefore, the GLO proposes an amendment to §15.6 adding a new subsection (f)(5) to allow all local jurisdictions to permit the use of fibercrete in 4-foot by 4-foot sections, 4 inches thick separated by expansion joints beneath the footprint of the habitable structure in the area located between 25 feet from the landward toe of the foredunes. In areas where dunes have been obliterated by storms or other causes, an alternative determining factor is need to decide where fibercrete may be used. Therefore, in areas where there are no dunes, the amendment would allow the use of fibercrete landward of 100 feet from the line of vegetation or landward of an eroding area boundary established in the local dune protection and beach access plan, whichever distance is greater. This provision applies in jurisdictions whether or not a fibercrete variance has been adopted.

§15.7 Local Government Management of the Public Beach

The 81st Legislature enacted HB 1213 (Acts 2009, 81st Leg., Ch. 40, eff. May 19, 2009) which amended §61.011(d)(3) of the Open Beaches Act to allow the Commissioner to adopt rules concerning the use on a public beach of a golf cart for the transportation of a person with a physical disability. The proposed change to §15.7 adds a new subsection (h)(5) to require a local government to allow the use of a golf cart on a pedestrian beach if the golf cart is being operated by or for the transportation of a disabled veteran or a person with a physical disability and a disabled parking placard issued under §681.004, Texas Transportation Code, is displayed in a conspicuous manner on the golf cart. "Golf cart" has the meaning assigned by §502.001, Texas Transportation Code, and does not include all-terrain vehicles, neighborhood electric vehicles, or recreational off-highway vehicles. The new provisions are mandatory and allow the operation of a golf cart for the transportation of a person with a disability anywhere on the public beach, but does not allow operation of a golf cart on a dune. The new subsection also requires a local government to provide at least one ingress/egress access way accessible to golf carts for each area of the beach where vehicles are prohibited. In areas where a seawall is located adjacent to the public beach, the GLO considers the seawall as one area, and at least one ingress/egress point accessible to golf carts for disabled persons would be necessary. Openings between bollards or ramps for maintenance vehicles may satisfy this requirement. The new subsection (h)(5)(C) also allows the local government to limit the use of golf carts for the transportation of a person with a physical disability to electric powered golf carts.

§15.8 Beach User Fees

Beach user fee (BUF) regulations in §15.8 require the maintenance of separate banking accounts for BUF funds from other revenue sources. In view of technological advances in accounting, it is no longer essential to require a separate physical bank account. Currently acceptable accounting practices allow revenue to be pooled into one physical bank account, but tracked through unique revenue accounts. The proposed changes to §15.8 would modify the existing requirement to maintain separate physical accounts, which often come at additional costs, and strengthen the local government's obligation to track BUF revenues. In addition, the proposed changes add a reference to §15.7(h)(5) concerning use of golf carts on pedestrian beaches to existing language requiring local governments to establish, preserve, and enhance access for disabled persons.

§15.9 Penalties and Remedial Orders

HB 2819 amended §61.018(c) of the Open Beaches Act and §63.181(b) of the Dune Protection Act to increase maximum civil penalties from $1000 per day per violation to $2000 per day per violation. The amendments also added the assessment of civil penalties for remedial orders for removal of structures on the public beach under §61.0183 of the Open Beaches Act and remedial orders for dune restoration under §63.091 Dune Protection Act. The proposed changes to §15.9 include a change to the name of the section from "Penalties" to "Penalties and Remedial Orders" as well as the increased penalties for violations of the Open Beaches Act and the Dune Protection Act and the violation of remedial orders issued by the Commissioner.

HB 2819 added new §61.0181 the Open Beaches Act to authorize the Commissioner to assess administrative penalties for violations of the Open Beaches Act or rules adopted thereunder and also added new §63.1811 to the Dune Protection Act to authorize the Commissioner to assess administrative penalties for violations of §63.091 of the Dune Protection Act or any rules, permits, or orders issued thereunder. Amendments to §15.9 would add administrative penalties to the enforcement options available to the Commissioner. The proposed changes also eliminate reference to the role of the attorney general's office in local government plan review based upon changes by the 78th Legislature to §61.015 of the Open Beaches Act, contained in HB 1547 (Acts 2003, 78th Leg., ch. 245, §2, eff. June 18, 2003).

HB 2819 also added new §61.0183 and §61.0184 to the Open Beaches Act to authorize the Commissioner to remove certain structures, improvements, obstructions, barriers, and hazards on the public beach when such structures present a public health and safety hazard or are placed on the beach in a manner inconsistent with the local government's beach access and use plan. Owners of residential structures would have lower maximum penalties and a longer time period to request a hearing with the State Office of Administrative Hearings before the Commissioner decides to proceed with a removal order. Rules proposed

by the GLO would amend §15.9 to include procedures for removing certain structures, improvements, obstructions, barriers, and hazards and provide notice to the person who is constructing, maintaining, controlling, owning, or possessing the structure, improvement, obstruction, barrier, or hazard. There are special provisions which apply to residential structures.

HB 2819 amended the Dune Protection Act by amending §63.181(b) and adding new §63.1813 to authorize the Commissioner to order restoration of damage, destruction or removal of a sand dune or a portion of a sand dune or the killing, destruction, or removal of vegetation growing on a sand dune seaward of the dune protection line in violation of the Dune Protection Act, or any rule, permit, or order issued thereunder. Rules proposed by the GLO will amend §15.9 to include procedures for ordering restoration and providing notice to the person who most recently owned, maintained, controlled, or possessed the real property on which the conduct occurred.

New §61.0182 of the Open Beaches Act and new §63.1812 of the Dune Protection Act make the new administrative enforcement provisions under the Open Beaches Act and the Dune Protection Act cumulative of all applicable penalties, remedies, enforcement, and liability provisions. Section 15.9 will be amended to include these cumulative enforcement provisions. The addition of new administrative enforcement provisions does not preclude the GLO or a local government from seeking injunctive relief or civil penalties in a suit by the attorney general's office at the request of the Commissioner or a suit by a county attorney, district attorney, or criminal district attorney as authorized by §63.181(a) of the Dune Protection Act, §63.181(a) or §61.018(b) of the Open Beaches Act.

§15.14 Determination of Insurable Status of Structures on the Public Beach and Notification to Texas Windstorm Insurance Association

HB 2819 also amended §61.011(d)(10) of the Open Beaches Act and §2210.004 of the Texas Insurance Code to authorize the Commissioner to establish by rule the procedures for determining whether a structure is not insurable property for purposes of §2210.004, Insurance Code, relating to the Texas Windstorm Insurance Program because of its location on the public beach and the factors listed in Subsection (h) of that section. Section 2210.004(h) as added by HB 2819 provides that a structure is not insurable property for purposes of the Texas Windstorm Insurance Program if the commissioner of the GLO notifies the Texas Windstorm Insurance Association (TWIA) of a determination that the structure is located on the public beach and that the structure (1) constitutes an imminent hazard to safety, health, or public welfare; or (2) substantially interferes with the free and unrestricted right of the public to enter or leave the public beach or to traverse any part of the public beach. HB 2819 also added new §61.0184 to the Open Beaches Act, which provides requirements for notice to affected property owners, an opportunity for hearing, and notification to the TWIA concerning the status of the property. The GLO proposes new §15.14 to establish rules for administrative procedures to determine if a structure is not insurable property for purposes of §2210.004 because of the factors listed in Subsection (h) and for notification to the TWIA.

§15.15 Criteria for Determining Health and Safety Hazards Associated with Structures on the Public Beach

Section 61.011(d)(9)(A) of the Open Beaches Act as amended by HB 2819 authorizes the Commissioner to promulgate rules which establish criteria for the factors to be considered in determining whether a structure, improvement, obstruction, barrier, or hazard on the public beach constitutes an imminent hazard to safety, health or public welfare. These criteria will be applied to decisions by the Commissioner for notification to the TWIA as to the status of a structure located on the public beach. These criteria will also be applied to the Commissioner's decision to order removal of certain structures, improvements, obstructions, barriers, and hazards on the public beach, as provided for under §61.0183 of the Open Beaches Act as amended by HB 2819. The GLO proposes new §15.15 which outlines criteria for determining when a structure, improvement, obstruction, barrier, or hazard located on the public beach constitutes an imminent hazard to safety, health, or public welfare.

§15.16 Criteria for Determining Substantial Interference with Access to and Use of the Public Beach by Structures on the Beach

Section 61.011(d)(9)(B) of the Open Beaches Act as amended by HB 2819 authorizes the Commissioner to promulgate rules which establish criteria for factors to be considered in determining whether a structure, improvement, obstruction, barrier, or hazard on the public beach substantially interferes with the free and unrestricted right of the public to enter or leave the public beach or traverse any part of the public beach. These criteria will be applied to decisions by the Commissioner for notification to the TWIA as to the status of a structure located on the public beach. The GLO proposes new §15.16 which outlines these criteria.

FISCAL AND EMPLOYMENT IMPACTS

Ms. Jodena Henneke, Deputy Commissioner for the GLO's Coastal Resources Program Area, has determined that for each year of the first five years the amended and new sections as proposed are in effect there will be no fiscal implications for state government as a result of enforcing or administering the amended and new sections. There will be no fiscal impact on local governments for each of the first five years the amended and new sections as proposed are in effect as a result of enforcing or administering the rules contained in §§15.2, 15.3, 15.8, 15.9, 15.14, and 15.15. The amendment to §15.7 requiring local governments that restrict the use of vehicles from sections of the beach to provide at least one ingress/egress access way accessible to golf carts may result in increased expenses to local governments if existing access does not comply with this provision. Estimates for improved access ways accessible to golf carts range from $15,000 each for ramps with flexible removable mats to an amount of $150,000 for a concrete or asphalt ramp.

Ms. Henneke has determined that the proposed new rules and rule amendments in §§15.2, 15.3, 15.6, 15.7, 15.8, 15.9, 15.15, and 15.16 will not increase the costs of compliance for small or large businesses. If the Commissioner decides to notify the TWIA that structures located on the beach are no longer insurable property for purposes of §2210.004, Insurance Code, because of the factors listed in Subsection (h) of that section under the proposed rules (§15.14), there will be a potential fiscal impact for individuals if a catastrophic loss occurs to the structure after the determination that it is not insurable property. The GLO estimates that approximately 40 single-family residential structures are potentially impacted by denial of eligibility for windstorm insurance through TWIA in Galveston and Brazoria Counties over the next five years, with an average insured value of $176,765 per structure.

The GLO has determined that a local employment impact statement on these proposed regulations is not required, because the proposed regulations will not adversely affect any local economy in a material manner for the first five years they will be in effect. The GLO has also determined that an economic impact statement and regulatory flexibility analysis on these proposed regulations is not required, because the proposed regulations don not have a material adverse economic effect on small businesses.

PUBLIC BENEFIT

Ms. Henneke has determined that the public will benefit from the proposed regulations concerning review and construction of large-scale construction because the size and potential impacts of such construction require additional time for technical review and consideration of local impacts as compared with small-scale projects. The additional time will also allow the GLO and local governments to meet with project developers and local governments to minimize and avoid proposed construction impacts to beach access and dune protection.

In addition, the public will benefit from the additional guidance for local governments to adjust dune protections lines when dune fields are adversely affected by erosion caused by natural forces, including storms, and their modification by development. The natural protection from storms provided by dunes for public and private resources will be enhanced by these additional considerations.

The public will benefit from the 90-day time period authorized for the review and discussion with local governments on proposed substantial changes to beach and dune plans, because the additional time will be used to assure that large and complex changes are being done in such a manner as to benefit public beach access and dune protection. The rules for expedited review authorized by HB 2819 provide a mechanism for local governments, with sufficient justification, to submit for GLO review less complex changes to plans, along with shorter time periods for review. Accounting procedures for revenues from beach user fees will be made consistent with current accounting practices.

The administrative processes for determination of the LOV and determination of whether a structure on the beach constitutes a hazard to health and safety or substantially interferes with public beach access and use provide an alternative to costly litigation. Recognition of determination of the LOV by the GLO as prima facie evidence of the landward boundary of the area subject to the public easement improves the GLO's ability to defend the common law right of the public to use and enjoyment of the public beach.

The Commissioner has been given a greater flexibility in the ability to request the attorney general to seek civil penalties for violations of the Open Beaches Act, the Dune Protection Act, or rules or orders authorized under those Acts. Maximum penalties have been increased and the cumulative impacts of multiple violations under both acts can be considered in setting penalties. The Commissioner has also been given new authority to assess administrative penalties for violations of the Open Beaches Act and the Dune Protection Act. Statutory requirements for the application of these penalties ensure that the Commissioner has substantial discretion to consider extenuating circumstances or to apply maximum penalties when the amount is considered necessary to deter future violations. The public will benefit from the increased flexibility and ability of the Commissioner to assess penalties, particularly when dealing with repeat offenders.

The Commissioner's new authority to remove structures or to apply an administrative penalty provides a benefit to the public for unhindered access to the public beach. The statutory authority and proposed implementing rules will ensure that structures, improvements, obstructions, barriers, or hazards which present a public health and safety hazard or are placed on the public beach in a manner inconsistent with the local government's beach access and use plan are removed as expeditiously as possible while respecting public property rights. In addition to maintaining the beach easement open for public access, the new procedures will protect the public from safety and health hazards and create sufficient space for beach renourishment projects which are necessary to protect public infrastructure, such as roads, utilities, and residential and commercial structures further landward, from future erosion.

The public will benefit from the new provisions allowing the use of fibercrete as it provides an equal or better level of protection of dunes, dune vegetation, and public access to and use of the beach in that: (1) debris removal and beach clean-up are facilitated by the use of unreinforced fibercrete in large 4-foot by 4-foot sections rather than small pavers, with less sand removed from the beach during clean-up; and (2) prohibiting the use of fibercrete in the area between the line of vegetation and 25 feet from the north toe of the dune ensures that dune hydrology is not adversely affected. Further, the provisions allowing an alternate a distance of 100 feet from the line of vegetation where no dunes exist will allow the continued use of fibercrete when rebuilding after storms that obliterate existing dunes.

The public will also benefit from the GLO's determination that structures on the public beach will no longer qualify as insurable property for purposes of the Texas Windstorm Insurance Program. Such a determination would follow the collection of evidence that safety and health hazards are present or substantial interference with beach access exists. Determination that a structure is not insurable property for purposes of the Texas Windstorm Insurance Program facilitates either voluntary or mandatory removal of the structure and potentially reduces financial costs to the state and property owners for such removal, by providing an alternative to costly litigation.

The public will benefit from the Commissioner's ability to order restoration of damage to dunes or dune vegetation or to apply an administrative penalty against those individuals responsible for the damage. The proposed regulations serve the purpose of deterring individuals who might otherwise damage dunes or dune vegetation without seeking a permit for such actions. When individuals seek a permit to modify dunes or dune vegetation for construction, road building or other activities, they are obligated to provide alternatives to the proposed action by identifying measures to avoid or minimize damage to dunes and dune vegetation. If these alternatives are not practicable due to cost, limits on building practices, or lot size, then the applicant must provide a mitigation plan which restores dunes and dune vegetation as close to the natural contours and vegetated conditions as possible. Protecting dunes and dune vegetation is important because vegetated dunes protect private and public property from storm surge, sustain areas of biological diversity, and ensure that beaches retain their natural qualities for the enjoyment of Texans and visitors. Current enforcement practice for damage to dunes and dune vegetation requires the Commissioner to seek assistance from the attorney general to require restoration, and charge civil penalties or seek reimbursement for the costs of restoration. With the new authority provided under the Dune Protection Act, the Commissioner will be able to order

restoration and assess administrative penalties, providing for a more efficient process.

CONSISTENCY WITH CMP

The proposals to amend §§15.2, 15.3, 15.6, 15.7, 15.8, and 15.9 concerning definitions of small scale construction, large scale construction, and restoration; procedures for establishment of a dune protection line; review periods for large and small scale construction; standard and expedited periods for review of local government beach and dune plans; establishment of the line of vegetation as prima facie evidence for the boundary of the public beach easement; changes allowing the use of fibercrete in certain areas; changes allowing the use of golf carts on the beach for the transportation of disabled persons; changes for beach user fee revenue accounts; changes to penalties for violations of the Open Beaches Act and the Dune Protection Act; and remedial orders are subject to the Coastal Management Program (CMP), 31 TAC §505.11(c), relating to the Actions and Rules subject to the CMP. The GLO has reviewed these proposed actions for consistency with the CMP's goals and policies in accordance with regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals), §501.26 (relating to Policies for Construction in the Beach/Dune System), and §501.27 (relating to Policies for Development in Coastal Hazard Areas).

New §§15.14, 15.15, and 15.16 concerning determination as to when a structure is an imminent hazard to public health or safety or interferes with public access to the beach; and procedures to determine whether a structure is not insurable property for purposes of the windstorm insurance program are also subject to the Coastal Management Program (CMP), 31 TAC §505.11(c), relating to the Actions and Rules subject to the CMP. The GLO has reviewed these proposed actions for consistency with the CMP's goals and policies in accordance with regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.26 (relating to Policies for Construction in the Beach/Dune System).

Amendments proposed to §§15.2, 15.3, and 15.8 consist of minor technical changes to procedures and are consistent with the GLO's Beach/Dune Rules that the Council has previously found to be consistent with the CMP.

The amendment to §15.6 concerning the use of fibercrete will not allow the material weakening of dunes and does not affect the requirement that unavoidable damage to dunes and dune vegetation be compensated. Additionally, the amendment will preserve public beach access by assisting with debris removal in the event of a storm. The GLO has determined that the proposed actions provide equal or better protection for dunes, dune vegetation, and public access to and use of the beach as the GLO's Beach/Dune Rules that the Council has determined to be consistent with the CMP. Consequently, the GLO has determined that the proposed actions are consistent with applicable CMP goals and policies.

The new rules for preserving and enhancing beach access for disabled persons are consistent with the CMP policies for construction in the beach/dune system contained in 31 TAC §501.26(a)(4) by ensuring the ability of the public, individually and collectively, to exercise its common law rights of use of and access to and from public beaches.

Amended rules concerning civil and administrative penalties and remedial orders for removal of structures in §15.9 and new rules proposed in §§15.13, 15.14, and 15.15 are consistent with the CMP goal outlined in 31 TAC §501.12(4) of ensuring and enhancing public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone. If the Commissioner determines that a structure constitutes an imminent hazard to public health and safety or substantially interferes with public access to the beach, then denial of insurable status for purposes of windstorm insurance coverage is a cost effective option to facilitate removal of the structure from the public beach. The Commissioner may also determine that a structure on the public beach constitutes an imminent hazard to public health and safety or was placed on the beach in a manner inconsistent with the local government's beach and dune plan, in which case the Commissioner may assess administrative penalties, issue a removal order or seek the assistance of the Attorney General to assess civil penalties or issue an injunction in order to facilitate the removal of the structure from the public beach. Offering the owner an opportunity for a hearing before the State Office of Administrative Hearings to contest the determination protects the due process rights of beachfront property owners.

Amended rules addressing penalties and remedial orders in §15.9 are also consistent with the CMP goals outlined in 31 TAC §501.12(1) and (3) of protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of Coastal Natural Resource Areas (CNRAs) and minimizing loss of human life and property due to the impairment and loss of protective features of CNRAs. If the Commissioner determines that dunes or dune vegetation have been damaged or destroyed without a permit authorizing mitigation or in a manner inconsistent with the conditions of a permit or a rule, the Commissioner may assess administrative penalties, issue a remedial order, or seek civil penalties or an injunction through the Attorney General in order to restore dunes and dune vegetation damaged by the violation. Offering the owner an opportunity for a hearing before the State Office of Administrative Hearings to contest the determination protects the due process rights of beachfront property owners.

The new rules for denial of eligibility for windstorm insurance, removal of structures from the beach, and penalties are also consistent with the CMP policies for construction in the beach/dune system contained in 31 TAC §501.26(a)(4) by ensuring the ability of the public, individually and collectively, to exercise its common law rights of use of and access to and from public beaches. Denial of insurable status for purposes of windstorm insurance based on a determination by the Commissioner as to the status of the property located on the public beach not only facilitates removal of the structure from the public beach, but also enhances the ability of the GLO to undertake coastal erosion response projects, including beach nourishment in the area occupied by the structure after it is removed. The new rules also authorize the Commissioner to assess administrative penalties, issue a remedial order, or seek civil penalties or an injunction through the attorney general in order to remove a structure from the public beach when the structure is a health and safety hazard or was placed on the public beach in a manner that is inconsistent with the local government's beach access and use plan.

The new rules for dune restoration in §15.9 are also consistent with the CMP policies outlined in 31 TAC §501.26(a)(1) that prohibit construction within a critical dune area that results in the material weakening of dunes and dune vegetation. Generally, construction without a permit issued by the local government or that is conducted outside the conditions of a permit can potentially

result in a material weakening of dunes and dune vegetation, because the person undertaking the construction has not followed the mitigation sequence, including avoidance, minimization, or mitigation to prevent material weakening of dunes or dune vegetation. If the Commissioner determines that dunes or dune vegetation have been damaged or destroyed without a permit authorizing mitigation or in a manner inconsistent with the conditions of a permit or a rule, the Commissioner may assess administrative penalties, issue a remedial order, or seek civil penalties or an injunction through the attorney general in order to restore dunes and dune vegetation damaged by the violation. The imposition of administrative penalties and requirement of remedial action will deter similar violations by others.

Consequently, the GLO has determined that the proposed actions are consistent with the applicable CMP goals and policies. The proposed amendments and new rules will be distributed to Council members in order to provide an opportunity for comment on the consistency of the proposed rules.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed amendments and new rules to determine whether Texas Government Code, Chapter 2007 (Private Real Property Rights Preservation Act), is applicable and a detailed takings assessment is required. The GLO has determined that the proposed amendments and new rules do not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19 of the Texas Constitution. In the controlling legal authority on the issue, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the U.S. Supreme Court found a constitutional taking where limits on construction "denies all economically beneficial or productive use of land." The Court held that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property.

The Open Beaches Act does not create public beach access and use rights, but rather provides a system of administration and enforcement for the rights that exist under state common law. State v. Markle, 363 S.W.2d 332 (Tex. Civ. App.-Houston 1964, no writ). See also Matcha v. Mattox, 711 S.W.2d 95, 101 (Tex. App.-Austin 1986, writ ref'd n.r.e.) cert. denied, 481 U.S. 1024 (1987). The proposed amendments and new sections pertaining to administrative enforcement of the Open Beaches Act, including amendments to §15.9 (relating to Penalties and Remedial Orders) and new §§15.14, 15.15, and 15.16 relating to the authority of the Commissioner to determine when a structure is an imminent hazard to public health or safety or interferes with public access to the beach, and to establish rules in determining whether a structure on the public beach is not insurable property eligible for coverage under the Texas Windstorm Insurance Program, likewise provide for administration and enforcement of rights to public beach access and use that exist under state common law.

State courts have recognized the establishment of a public beach easement for unrestricted travel and recreation uses by virtue of prescriptive right, implied dedication, and custom along various parts of the Texas Gulf shore. See, e.g. Matcha, 711 S.W.2d at 98-100 (public easement by custom on Galveston's West Beach); Moody v. White, 593 S.W.2d 372, 377-79 (Tex. Civ. App.-Corpus Christi 1979, no writ) (public easement by prescription and implied dedication to beach on Mustang Island); Villa Nova Resort, Inc. v. State, 711 S.W.2d 120, 127-28 (Tex. App.-Corpus Christi 1986, no writ) (public easement by prescription and implied dedication to beach on South Padre Island).

Since widespread public use of the shore historically occurred on the sand beach seaward of the vegetated dunes, the landward boundary of this public easement is commonly the line of vegetation. Feinman v. State, 717 S.W.2d 10, 111-114 (Tex. App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.); Matcha, 711 S.W.2d at 99-100. The ribbon of public easement on the dry beach is subject to widening and narrowing, as well as net migration landward and seaward, with the natural movements of the vegetation line and the high tide line. Brannon v. State, ___ S.W.3d ___ (Tex.App.-Houston [1st Dist.] Aug. 28, 2009). The amendments to §15.3 include procedures for insuring that identification of the LOV submitted by local governments and applicants for beachfront construction certificates is verified by the GLO in a manner consistent with statutory requirements provided in §61.016 and §61.017 of the Open Beaches Act.

These state law principles define the bundle of rights that property owners acquire when they purchase beachfront property. Because of shore dynamics, beachfront property owners purchase both the opportunity for property gain, as well as the risk of property loss. Under Texas property law, any right of beachfront property owner to exclude the public and to keep structures on these parcels extends seaward to the vegetation line, but that yields to a superior public right as the vegetation line retreats. State courts, recognizing the public's property rights, have ordered a variety of structures to be removed from the public beach easement, including a motel, a beach house under post-storm reconstruction, a bulkhead protecting a beach house from coastal erosion, and barriers to traffic along the beach.

The purpose of the proposed amendments and new sections is to provide alternative means and methods through an administrative process for determination of the LOV and for determination of whether a structure on the beach constitutes a hazard to health and safety or substantially interferes with public beach access and use. The proposed regulations further the stated purpose and accomplish results that could be achieved in the courts of this state. The alternative to adoption of the administrative process outlined in the proposed regulations is to continue to rely on costly litigation to resolve issues related to enforcement of rights to public beach access and use that exist under state common law.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The proposed amendments are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking implements legislative requirements in Texas Natural Resources Code §§61.011, 61.015, 61.018, 61.0181 -

61.0184, 61.020, 63.002, 63.056, 63.121, 63.181, and 63.1811 - 63.1814. These sections as amended by HB 2819, provide the GLO with the authority to adopt rules for the preservation and enhancement of the public's right to use and have access to and from the public beaches of Texas, rules to certify that local government plans to manage the beach/dune system are consistent with state law, rules for determination of the LOV, rules for determination of whether a structure on the beach constitutes a hazard to health and safety or substantially interferes with public beach access and use, and rules to insure that proposed construction meets the objectives of the Dune Protection Act.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking or its consistency with the CMP goals and policies, please send a written comment to Mr. Walter Talley, Texas Register, Liaison, Texas General Land Office, P.O. Box 12873, Austin, TX 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The amendments and new sections are proposed under Texas Natural Resources Code §§61.011, 61.015, 61.018, 61.0181 - 61.0184, 61.020, 63.002, 63.056, 63.121, 63.181, and 63.1811 - 63.1814. These sections as added and amended by HB 2819 and HB 1213 provide the Commissioner of the GLO with the authority to adopt rules for the use of golf carts on public beaches for the transportation of disabled persons, for the preservation and enhancement of the public's right to use and have access to and from the public beaches of Texas, to certify that local government plans to manage the beach/dune system are consistent with state law, for determination of the LOV, for determination of whether a structure on the beach constitutes a hazard to health and safety or substantially interferes with public beach access and use, and to insure that proposed construction meets the objectives of the Dune Protection Act.

Texas Natural Resources Code §§33.605, 33.607, 61.011, 61.015, 61.018, 61.0181 - 61.0184, 61.020, 63.002, 63.056, 63.121, 63.181, and 63.1811 - 63.1814, as well as Texas Insurance Code §2210.004 are affected and implemented by the proposed amendments and new rules.

§15.2. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (39) (No change.)

(40) Large-scale construction--Construction activity greater than 5,000 square feet or [~~in area and~~] habitable structures greater than two stories in height. Both the area beneath the lowest habitable level of an elevated structure and a cupola (i.e. "widow's walk") with an area of 400 square feet or less on the top of the second habitable story are not considered stories for the purpose of this section. Multiple-family habitable structures are typical of this type of construction.

(41) - (60) (No change.)

(61) Restoration--Repair or replacement of dunes or dune vegetation[~~The process of constructing man-made vegetated mounds, repairing damaged dunes, or vegetating existing dunes~~].

(62) - (65) (No change.)

(66) Small-scale construction--Construction activity less than or equal to 5,000 square feet or [~~and~~] habitable structures less than or equal to two stories in height. Both the area beneath the lowest habitable level of an elevated structure and a cupola (i.e. "widow's walk") with an area of 400 square feet or less on the top of the second habitable story are not considered stories for the purpose of this section. Single-family habitable structures are typical of this type of construction.

(67) - (70) (No change.)

§15.3. Administration.

(a) (No change.)

(b) Boundary of the public beach. The public beach is defined in the Open Beaches Act, §61.013(c), and §15.2 of this title (relating to Definitions). The line of vegetation is defined in the Open Beaches Act, §61.001(5), and §15.2 of this title (relating to Definitions). The line of vegetation is typically used to determine the landward extent of the public beach. However, there are portions of the Texas coast where there is no marked vegetation line or the line is discontinuous or modified. In those portions of the coast, the line of vegetation shall be determined consistent with §15.10(b) of this title (relating to General Provisions) and the Open Beaches Act, §61.016 and §61.017.

(1) If there is no clearly marked line of vegetation, the "line of vegetation" delineating the public beach shall be the line of constant elevation connecting two clearly marked lines of vegetation of equal elevation on each side, but if there are no clearly marked lines of vegetation on each side, the "line of vegetation" shall not extend inland further than 200 feet from the seaward line of mean low tide.

(2) If there is no clearly marked line of vegetation, the "line of vegetation" delineating the public beach shall be the line of average elevation connecting two clearly marked lines of vegetation of unequal elevation on each side, but if there are no clearly marked lines of vegetation on each side, the "line of vegetation" shall not extend inland further than 200 feet from the seaward line of mean low tide.

(3) If the vegetation line has been obliterated or is created artificially and there is a vegetation line consistently following a line more than 200 feet from the seaward line of mean low tide, the 200-foot line shall constitute the landward boundary of the area subject to the public easement.

(4) An individual seeking line of vegetation determination for a proposed purchase of property or for proposed construction must initially file a request with the local government having authority for Beachfront Construction Certificates/Dune Protection Permits. After review by the local government, the request and initial determination by the local government must be forwarded to the General Land Office for review and approval. Provided, however, if the Commissioner has issued a temporary standard for demarcation of the landward boundary of the public beach as part of a disaster recovery order under §15.13 of this title (relating to Disaster Recovery Orders), an initial determination by the local government is not required.

(5) When a Beachfront Construction Certificate/Dune Protection Permit application is submitted to the General Land Office for review and comment, the line of vegetation depicted on any map, aerial photograph, or other documentation shall be subject to verification by the General Land Office.

(6) The determination of the location of the line of vegetation by the commissioner of the General Land Office as provided by the Open Beaches Act, §61.016 and §61.017, constitutes prima facie evidence of the landward boundary of the area subject to the public easement until a court adjudication establishes the line in another place.

(c) - (e) (No change.)

(f) Establishment of dune protection lines. Pursuant to the authority provided in the Dune Protection Act, §63.011, local governments shall establish and maintain dune protection lines which preserve, at a minimum, the dunes within the critical dune areas as defined in this subchapter. The establishment of the line should include the protection of critical dune areas from erosion caused by natural forces and development on adjacent land. Accordingly, the Dune Protection Line should be established in a location that will allow local governments to implement Texas Natural Resources Code, §33.607. A local government must conduct a field inspection to determine the approximate location of the line unless it proposes to establish or relocate its line at a distance of 1,000 feet of mean high tide of the Gulf of Mexico, as that 1,000 feet is the maximum extent of the local government's jurisdiction for establishing dune protection lines.

(g) - (n) (No change.)

(o) Submission of local government plans to the General Land Office [~~state agencies~~]. Local governments shall submit dune protection and beach access plans to the General Land Office for review, comment, and certification as to compliance with this subchapter, the Dune Protection Act, and the Open Beaches Act [~~and to the attorney general's office for review and comment~~].

(1) (No change.)

(2) Review of plan amendments. The General Land Office shall either grant or deny certification of a local government's formally approved dune protection and beach access plan within 90 [~~60~~] days of receipt of the plan.

(A) Depending upon the degree or complexity of modifications contained in the plan amendment, the local government may request a review period shorter than 90 days based on the following guidelines:

(i) Expedited Review period of 30 days may be requested for review of a plan amendment that is administrative in nature and does not contain variances nor substantially alter beach access or dune protection.

(ii) Standard Review period of 60 days may be requested for review of a plan amendment that does not contain any changes to beach user fees, beach access points, changes to vehicular access, nor substantially alter beach access or dune protection.

(iii) The local government shall provide a reasoned justification with any request for a review period of less than 90 days. It must include a detailed description of the proposed changes that will result from the amendment.

(iv) The General Land Office will make a determination on the eligibility of an amendment for a shortened review period and notify the local government of the determination within ten working days (to run concurrently with the applicable review period) from the date the request and complete package of information regarding the proposed amendment is received. Review of plan amendments that do not qualify for a shortened review period will be completed by the General Land Office within the allowed 90 day period.

(B) In the event of denial, the General Land Office shall send the plan back to the local government with a statement of specific objections and the reasons for denial of certification, along with suggested modifications. On receipt, the local government shall revise and resubmit the plan for [~~state agency~~] review.

(3) - (4) (No change.)

(5) Subsequent to initial certification, local governments may amend their dune protection and beach access plans by submitting the proposed changes to the General Land Office for review, comment, and certification [~~and to the attorney general's office for review and comment~~].

(6) (No change.)

(p) Submission deadline for dune protection and beach access plans. Local governments shall submit dune protection and beach access plans to the General Land Office [~~and the attorney general's office~~] no later than 180 days from the effective date of this subchapter. If the General Land Office does not approve a plan, the local government shall submit revisions of the plan until the plan is approved. However, any local government that submits a revised plan that has not been modified to address the state comments regarding the statutory requirements and the minimum standards identified in this subchapter is presumed to be in violation of this subchapter, the Open Beaches Act, and the Dune Protection Act. Local governments that fail to submit plans within 180 days of the effective date of this subchapter will be liable for penalties as provided in §15.9 of this title (relating to Penalties). Further, local governments that fail to submit plans by that deadline will not be authorized to permit construction within the geographic scope of this subchapter.

(q) - (r) (No change.)

(s) Acts prohibited without a dune protection permit or beachfront construction certificate. An activity requiring a dune protection permit may typically also require a beachfront construction certificate and vice versa. Local governments shall, whenever possible, issue permits and certificates concurrently when an activity requires both. In their dune protection and beach access plans, local governments may combine the dune protection permit and the beachfront construction certificate into a single permit or a two-part permit; however, they are not required to do so.

(1) - (5) (No change.)

(6) General Land Office [~~State agency~~] comments.

(A) A person proposing to conduct an activity for which a permit or certificate is required shall submit a complete application to the appropriate local government. The local government shall forward the complete application, notice of public hearing, and [~~including~~] any associated material [~~materials,~~] to the General Land Office [~~and the attorney general's office~~]. The application, hearing notice, any documents associated with the application, and information as to when the decision will be made must be received by the General Land Office [~~and the attorney general's office~~] no later than ten working days for small scale construction and 30 working days for large scale construction before the date of the local government's public hearing on the application or when the local government is first scheduled to act on the permit or certificate. A [~~Local governments shall not act on a permit or certificate application if the General Land Office and the attorney general's office have not received the application for the permit or certificate at least ten working days before the local government is first scheduled to act on the permit or certificate. However, a~~] local government may act on such applications following the public hearing or a decision by the commissioner's court or municipal governing body if the General Land Office [~~state agencies~~] received the application within the proper time frame and the state provides comments or does not submit comments on the application to the local government.

(B) The General Land Office [~~and the attorney general's office~~] may submit comments on the proposed activity to the local government. The review period for comments of ten working days for small scale construction and 30 working days for large scale construc-

tion is initiated only after the receipt by the General Land Office of all information required by this section.

(7) Local government review. When determining whether to approve a proposed activity, a local government shall review and consider:

(A) - (C) (No change.)

(D) the comments of the General Land Office [~~and the attorney general's office~~]; and

(E) (No change.)

(t) (No change.)

(u) Administrative record.

(1) (No change.)

(2) Local governments shall keep the administrative record for a minimum of three years from the date of a final decision on a permit or certificate. Local governments shall send to the General Land Office [~~or the attorney general's office,~~] upon request [~~by either agency,~~] a copy of those portions of the administrative record that were not originally sent to the General Land Office [~~those agencies~~] for permit or certificate application review and comment. The record must be received by the General Land Office [~~appropriate agency~~] no later than ten working days after the local government receives the request. The General Land Office [~~state agency reviewing the administrative record~~] shall notify the appropriate permittee of the request for a copy of the administrative record from the local government. Upon request of the permittee, a local government shall provide to the permittee copies of any materials in the administrative record regarding the permit or certificate which were not submitted to the local government by the permittee (i.e., the permit application) or given to the permittee by the local government (i.e., the permit).

§15.6. Concurrent Dune Protection and Beachfront Construction Standards.

(a) - (e) (No change.)

(f) Construction in eroding areas. Local governments with jurisdiction over eroding areas shall follow the standards provided in §15.4 of this title (relating to Dune Protection Standards) and §15.5 of this title (relating to Beachfront Construction Standards). If there is any conflict between this subsection, §15.4 of this title [~~(relating to Dune Protection Standards)~~], and §15.5 of this title [~~(relating to Beachfront Construction Standards)~~], this subsection applies. The General Land Office shall supply information for or assist a local government in determining eroding areas and the landward boundary of eroding areas. In addition, because of the higher risk of damage from flooding or erosion in such areas, local governments shall:

(1) - (4) (No change.)

(5) Notwithstanding the provisions of paragraph (3) of this subsection, a local government may allow a permittee to place unreinforced fibercrete in 4 foot by 4 foot sections, 4 inches thick separated by expansion joints beneath the footprint of the habitable structure, not including the area under decks, only if the fibercrete is not structurally attached to the pilings and placement of fibercrete will be entirely undertaken, constructed, and located at least 25 feet from the landward toe of the foredunes. If no dunes exist, placement of fibercrete may only be undertaken, constructed, and located at least 100 feet landward of the line of vegetation, or landward of an eroding area boundary established in the local dune protection and beach access plan, whichever distance is greater. Gravel or crushed limestone may be used to stabilize driveways in the area 50 feet landward of the line of vegetation to the Dune Protection Line.

(g) - (h) (No change.)

§15.7. Local Government Management of the Public Beach.

(a) - (g) (No change.)

(h) Preservation and enhancement of public beach use and access. A local government shall regulate pedestrian or vehicular beach access, traffic, and parking on the beach only in a manner that preserves or enhances existing public right to use and have access to and from the beach. A local government shall not impair or close an existing access point or close a public beach to pedestrian or vehicular traffic without prior approval from the General Land Office.

(1) For the purposes of this subchapter, beach access and use is presumed to be preserved if the following criteria are met.

(A) - (B) (No change.)

(C) Signs are conspicuously posted which explain the nature and extent of vehicular controls, parking areas, and access points, including access for disabled person. Local governments may establish their own beach access and use standards for General Land Office approval and certification based upon the General Land Office's affirmative finding that such standards preserve and enhance the public's right to use and access the public beach.

(2) - (4) (No change.)

(5) A local government may not restrict vehicular traffic from a public beach unless it preserves or enhances beach access for disabled persons. For the purposes of this subchapter, beach access for disabled persons is preserved if the following criteria are met:

(A) In areas where vehicles are prohibited from driving on and along the beach, the local government must allow the use on the beach of a golf cart, as defined by §502.001, Texas Transportation Code, if:

(i) the golf cart is being operated by or for the transportation of a disabled veteran or a person with a physical disability; and

(ii) a disabled parking placard issued under §681.004, Texas Transportation Code, is displayed in a conspicuous manner on the golf cart.

(B) The local government must provide at least one ingress/egress access way accessible to golf carts for each area of the beach where vehicles are prohibited.

(C) A local government may limit the use of golf carts for the transportation of a person with a physical disability to electric powered golf carts.

(D) In this section, "golf cart" and "public highway" have the meanings assigned by §502.001, Texas Transportation Code.

(i) Request for General Land Office [~~state agency~~] approval of beach access plan. When requesting approval, a local government shall submit a plan to the General Land Office [~~and the attorney general's office~~] providing the following information:

(1) - (2) (No change.)

(3) a detailed description of the proposed beach access plan replacing the existing beach access system. Such description shall demonstrate the method of providing equivalent or better access to and from the public beaches, including access for disabled persons; and

(4) a vehicular control plan, if the local government proposes either new or amended vehicular controls for the public beach. The vehicular control plan must include, at a minimum, the following information:

(A) - (C) (No change.)

(D) an analysis and statement of how the proposed vehicular controls are consistent or inconsistent with the state standards for preserving and enhancing public beach access set forth in this subchapter. If a local government or the state determines that the vehicular controls are not consistent with state standards, the local government shall prepare a plan for achieving consistency within a period of time to be determined by the General Land Office [~~and the attorney general's office~~]. This plan shall include a detailed description of the means and methods of upgrading the availability of public parking and access ways, including funding for such improvements; and

(E) (No change.)

(j) - (m) (No change.)

§15.8. Beach User Fees.

(a) - (f) (No change.)

(g) Beach user fee accounts. Local governments shall use [~~follow~~] the following methods for administering beach user fee accounts.

(1) Beach user fee revenues shall be maintained and accounted for so that fee collections may be directly traced to expenditures on beach-related services. Beach user fee revenues shall not be commingled with any other funds and shall be maintained in separate revenue [~~bank~~] accounts.

(2) Beach user fee revenues shall be maintained in a separate revenue account and documented in a separate financial statement for each beach user fee. Beach user fee revenue account balances and expenditures shall be documented according to generally accepted accounting principles.

(h) (No change.)

(i) Access for disabled persons. Local governments shall establish, preserve, and enhance access for disabled persons as provided in §15.7(h)(5) of this title (relating to Local Government Management of the Public Beach). Provisions for access for disabled persons shall be included in local government dune protection and beach access plans.

(j) - (k) (No change.)

§15.9. Penalties and Remedial Orders.

(a) Penalties.

(1) Civil Penalties.

(A) In addition to any penalties assessed by a local government, any person [~~(as defined in this subchapter)~~] who violates either the Dune Protection Act, the Open Beaches Act, this subchapter, a removal order issued pursuant to subsection (b) of this section, a restoration order issued pursuant to subsection (c) of this section, or a permit or certificate condition is liable [~~to the General Land Office~~] for a civil penalty of not less than $50 nor more than $2000 [~~$1000~~] per violation per day as provided in the Dune Protection Act, §63.181(b) and the Open Beaches Act, §61.018(c). Each day the violation occurs or continues constitutes a separate violation. Violations of the Dune Protection Act, the Open Beaches Act, and the rules adopted pursuant to those statutes are separate violations, and the General Land Office may assess separate penalties. The assessment of penalties under one Act does not preclude another assessment of penalties under the other Act for the same act or omission. Conversely, compliance with one statute and the rules adopted thereunder does not preclude the General Land Office from assessing penalties under the other statute and the rules adopted pursuant to that statute.

(B) A local government may recover civil penalties in a suit by a county attorney, district attorney, or criminal district attorney as authorized in the Dune Protection Act, §63.181(a), and the Open Beaches Act, §61.018(b).

(2) Administrative Penalties.

(A) Any person who violates either the Dune Protection Act, the Open Beaches Act, this subchapter, or a permit or certificate condition is also liable to the General Land Office for an administrative penalty of not less than $50 nor more than $2000 per violation per day as provided in the Dune Protection Act, §63.1811, and the Open Beaches Act, §61.0181. Provided, however, if the structure that is the subject of an administrative penalty assessed pursuant to the Open Beaches Act, §61.0181, has been used as a permanent, temporary, or occasional residential dwelling by at least one person during the year before the date on which the penalty is assessed, the amount of the administrative penalty may not exceed $1000 per day the violation occurs or continues.

(B) Administrative penalties assessed by the Commissioner of the General Land Office (commissioner) as part of an order for dune restoration issued pursuant to the Dune Protection Act, §63.1813 or an order for removal of a structure issued pursuant to the Open Beaches Act, §61.0183, are subject to the notice, orders, and hearing requirements outlined in subsections (b) and (c) of this section, respectively. In determining the amount of the administrative penalty for violations of the Dune Protection Act and the Open Beaches Act, the General Land Office will consider the following:

(i) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation and the hazard or damage caused thereby;

(ii) the degree of cooperation and quality of response;

(iii) the degree of culpability and history of previous violations by the person subject to the penalty;

(iv) the amount of penalty necessary to deter future violations; and

(v) any other matter justice requires.

(3) [~~(b)~~] Local governments are included in the definition of "person" in §15.2 of this title (relating to Definitions), and as such, they are liable for penalties for any violations of this subchapter, the Dune Protection Act, and the Open Beaches Act. A local government will be liable for penalties for such violations, including, but not limited to, failure to submit a dune protection and beach access plan to the General Land Office [~~and the attorney general's office~~]; failure to maintain and enforce its plan; and failure to implement the plan. These violations are in addition to any other violations of this subchapter for which a local government may be liable for penalties.

(4) The provisions of this section are cumulative of all other civil and administrative penalties, remedies, and enforcement and liability provisions.

(5) [~~(c)~~] In determining whether the assessment of penalties is appropriate, the General Land Office will consider the following mitigating circumstances: acts of God, war, public riot, or strike; unforeseeable, sudden, and natural occurrences of a violent nature; and willful misconduct by a third party not related to the permittee or person responsible for the violation by employment or contract.

(b) Restoration for Damage, Destruction, or Removal of Dunes or Dune Vegetation.

(1) Pursuant to the Dune Protection Act, §63.1813, the commissioner may order restoration or contract for restoration for damage, destruction, or removal of a sand dune or a portion of a sand

dune or the killing, destruction, or removal of any vegetation growing on a sand dune seaward of the dune protection line or within a critical dune area in violation of the Dune Protection Act, this subchapter, or any rule, permit, or order issued under the Dune Protection Act.

(2) A person is considered to be engaging in or to have engaged in conduct that violates the Dune Protection Act or any rule, permit, or order issued under this Act if the person is the person who most recently owned, maintained, controlled, or possessed the real property on which the conduct occurred.

(3) Before the commissioner may order restoration or assess an administrative penalty under this section, the commissioner must give written notice and an opportunity for a hearing to the person charged with the violation in accordance with the Dune Protection Act, §63.1814 and the procedures outlined in paragraph (6) of this subsection. A person who does not request a hearing within 60 days after the date on which the notice is served waives all rights to judicial review.

(4) The person must request a hearing to contest the commissioner's findings or initiate restoration by filing an application for a dune protection permit with the local government with jurisdiction in the area in which the violation occurred within 60 days after service of the notice of violation. The permit application must address any technical specifications and monitoring requirements described in the commissioner's notice of violation.

(5) If the person fails to initiate restoration or make a timely written request for a hearing, the commissioner may order restoration, assess restoration costs, fees and expenses, impose an administrative penalty, or use any combination of these remedies. The order may specify the technical specifications for restoration and monitoring requirements.

(6) Notice, Orders, and Hearings.

(A) When the commissioner has determined that damage, destruction, or removal of dunes or dune vegetation is a violation of the Dune Protection Act, §63.091 or any rule, permit, or order issued under the Dune Protection Act, the commissioner must give written notice to the person that is taking or has taken actions that violate the Dune Protection Act, §63.091 or any rule, permit, or order issued under the Dune Protection Act. The notice must state:

(i) the specific conduct that violates the Dune Protection Act, this subchapter, or any permit or order issued under the Dune Protection Act;

(ii) that the person who has engaged in or has been engaged in the conduct that violates the Dune Protection Act, this subchapter, or any permit or order issued under the Dune Protection Act must perform restoration for the damage caused by the violation not later than the 60th day after the day the notice is served;

(iii) that failure to perform restoration for the damage caused by the violation may result in a liability for a civil penalty under the Dune Protection Act, §63.0181(b) in an amount specified, restoration contracted or undertaken by the commissioner, and liability for the costs of restoration, or any combination of those remedies; and

(iv) that the person who is engaging in or has engaged in conduct that violates the Dune Protection Act or any rule, permit, or order under the Dune Protection Act may submit, not later than the 60th day after the date on which the notice is served, a written request for a hearing to contest the commissioner's findings.

(B) The notice required by this subsection must be given:

(i) by service in person, by registered or certified mail, return receipt requested, or by priority mail; or

(ii) if personal service cannot be obtained or the address of the person is unknown, by posting a copy of the written notice at the site where the conduct was engaged in and by publishing notice in a newspaper with general circulation in the county in which the site is located at least two times within ten consecutive days.

(C) If the person requests a hearing, the commissioner must grant the hearing before an administrative law judge employed by the State Office of Administrative Hearings in accordance with the procedures outlined in the Dune Protection Act, §61.0184(g).

(7) If the person who is engaged in or has been engaged in conduct that violated the Dune Protection Act, §63.091 or any rule, permit, or order issued under the Dune Protection Act does not pay assessed administrative penalties, mitigation costs, other assessed fees and expenses, or file an application for a dune protection permit on or before the 60th day after the date of entry of a final order assessing the penalties, costs, and expenses, the commissioner may:

(A) contract for restoration;

(B) request that the attorney general institute civil proceedings to collect the penalties, costs of restoration, and other fees and expenses remaining unpaid; or

(C) use any combination of the remedies prescribed by this section, or other remedies authorized by law, to collect the unpaid penalties, costs of restoration, and other fees and expenses assessed because of unauthorized conduct and its mitigation by the commissioner.

(c) Removal of Certain Structures, Improvements, Obstructions, Barriers, and Hazards on the Public Beach.

(1) The commissioner may order the removal of a structure, improvement, obstruction, barrier, or hazard from a public beach or assess an administrative penalty in accordance with the Open Beaches Act, §§61.0181 - 61.0184 and this subsection. The term "structure" as used in this subsection has the meaning assigned in §15.2(67) of this title (relating to Definitions) and includes any improvement, obstruction, barrier or hazard on the public beach.

(2) For the purposes of this subsection, a person is considered to be the person who owns, maintains, controls, or possesses a structure or other encroachment on the public beach for the purposes of this subsection if the person is the person who most recently owned, maintained, controlled, or possessed the structure or other encroachment on the public beach.

(3) The commissioner may conduct an evaluation to determine if grounds for removal of a structure exist pursuant to the Open Beaches Act, §61.0183. The evaluation will include:

(A) a determination of whether the structure is located wholly or partially on the public beach in accordance with §15.3(b) of this title (relating to Boundary of the Public Beach).

(B) if the structure is determined to be located on the public beach, the evaluation will also include:

(i) a determination as to whether the structure constitutes an imminent hazard to safety, health, or public welfare as provided in §15.15 of this title (relating to Criteria for Determining Health and Safety Hazards Associated with Structures on the Public Beach); or

(ii) a determination as to whether the structure was constructed or placed on the beach in a manner that is inconsistent with the local government's beach access and use plan.

(4) Before the commissioner orders the removal of a structure or imposes an administrative penalty, the commissioner must give written notice and an opportunity for hearing to the person who is constructing, maintaining, controlling, owning, or possessing the structure on the public beach in accordance with the Open Beaches Act, §61.0184 and the procedures outlined in paragraph (6) of this subsection. The person must forward a copy of the notice to any entity or individual holding a lien, mortgage or any other property interest in the structure and provide evidence of compliance with this requirement to the General Land Office within ten days of receiving the notice.

(5) If the person fails to remove the structure or make a timely written request for a hearing, the commissioner may order the removal of the structure, assess removal costs, fees and expenses, impose an administrative penalty, or use any combination of these remedies.

(6) Notice, Orders and Hearings.

(A) Before the commissioner may order the removal of a structure, improvement, obstruction, barrier, or hazard under the Open Beaches Act, §61.0183, or impose an administrative penalty under the Open Beaches Act, §61.0181, the commissioner must provide written notice to the person who is constructing, maintains, controls, owns, or possesses the structure, improvement, obstruction, barrier, or hazard on the public beach. The notice must:

(i) describe the specific structure that violates the Open Beaches Act or this subchapter;

(ii) state that the person who is constructing, maintains, controls, owns or possess the structure is required to remove the structure:

(I) within a reasonable time specified by the commissioner if the structure is an imminent threat to public health, safety or welfare as provided in §15.15 of this title (relating to Criteria for Determining Health and Safety Hazards Associated with Structures on the Public Beach); or

(II) not later than the 30th day after the date on which the notice is served if the structure was constructed or placed on the beach in a manner that is inconsistent with the local government's beach access and use plan; or

(III) not later than the 90th day after the date on which the notice is served if the structure has been used as a permanent, temporary, or occasional residential dwelling by at least one individual at any time during the year preceding the date of the notice.

(iii) state that the failure to remove the structure may result in liability for a civil penalty under the Open Beaches Act, §61.018(c) in an amount specified, removal of the structure by the commissioner, and liability for the costs of removal, or any combination of these remedies;

(iv) state that the person may submit, not later than the 30th day after the date on which the notice is served, a written request for a hearing to contest the commissioner's findings. Provided, however, if the structure has been used as a permanent, temporary, or occasional residential dwelling by at least one individual at any time during the year before the date on which the notice is served, the person may submit, not later than the 90th day after the date on which the notice is served, a written request for a hearing. If the person does not make a timely request for a hearing, the person waives all rights to judicial review of the commissioner's findings or orders.

(B) The notice given by this subsection must be given:

(i) by service in person, by registered or certified mail, return receipt requested, or by priority mail; or

(ii) if personal service cannot be obtained or the address of the person is unknown, by posting a copy of the notice on the structure and by publishing notice in a newspaper with general circulation in the county in which the structure is located at least two times within ten consecutive days.

(C) If the person requests a hearing, the commissioner must grant the hearing before an administrative law judge employed by the State Office of Administrative Hearings in accordance with procedures outlined in the Open Beaches Act, §61.0184(g).

(7) If the person does not comply with a removal order of the commissioner or pay assessed penalties, removal costs, or other assessed fees and expenses on or before the 30th day after the date of entry of the final order, the commissioner may:

(A) contract for removal and disposal of the structure;

(B) sell salvageable parts of the structure to offset costs of removal;

(C) request that the attorney general institute civil proceedings to collect the penalties, costs of removal, and other fees and expenses assessed because of the structure's placement on the public beach and the removal order by the commissioner; or

(D) use any combination of remedies prescribed by this subsection, or other remedies authorized by law, to collect the unpaid penalties, costs of removal, and other fees and expenses assessed because of the structure's placement on the public beach and the removal order by the commissioner.

§15.14. Determination of Insurable Status of Structures on the Public Beach and Notification to Texas Windstorm Insurance Association.

(a) Determination that a Structure is not Insurable Property.

(1) The Commissioner of the General Land Office (commissioner) may determine that a structure, improvement, obstruction, barrier, or hazard located on the public beach is not insurable property as defined in Texas Insurance Code, §2210.004, for purposes of obtaining windstorm insurance through the Texas Windstorm Insurance Program. The term "structure" as used in this section has the meaning assigned in §15.2(67) of this title (relating to Definitions) and includes any improvement, obstruction, barrier, or hazard on the public beach. The commissioner will conduct an evaluation to determine the insurable status of the property for purposes of Texas Insurance Code, §2210.004. The evaluation will include:

(A) Coordination with the Texas Windstorm Insurance Association to determine if the structure is currently listed as insurable property.

(B) A determination that the structure is wholly or partially on the public beach in accordance with §15.3(b) of this title (relating to Boundary of the Public Beach).

(C) If the structure is determined to be located on the public beach, the evaluation will include:

(i) a determination as to whether the structure constitutes an imminent hazard to safety, health, or public welfare as provided in §15.15 of this title (relating to Criteria for Determining Health and Safety Hazards Associated with Structures on the Public Beach); or

(ii) a determination as to whether the structure substantially interferes with the free and unrestricted right of the public to enter or leave the beach or traverse any part of the public beach as

provided in §15.16 of this title (relating to Criteria for Determining Substantial Interference with Access to and Use of the Public Beach by Structures on the Beach).

(2) In accordance with Texas Natural Resources Code, §61.0184(b), the commissioner must serve written notice to a person who constructs, maintains, controls, owns, or possesses a structure on the public beach of the intent of the commissioner to notify the Texas Windstorm Insurance Association of the determination that the property is not insurable property for purposes of Texas Insurance Code, §2210.004, because of the factors listed in Subsection (h) of that section, effective upon the expiration of the current policy of windstorm insurance for the property that is the subject of the notice. The notice must include an opportunity for a hearing for the property owner under procedures outlined in subsection (b) of this section.

(3) A person who does not request a hearing within 30 days after the date on which the notice is served waives all rights to judicial review of the commissioner's findings or orders.

(b) Notice, Orders, and Hearings.

(1) When the commissioner has determined that a structure is not insurable property for purposes of Texas Insurance Code, §2210.004,, the commissioner must give written notice regarding the status of the property to a person who constructs, maintains, controls, owns, or possesses the structure located on the beach. The notice will consist of the following:

(A) The commissioner finds that a specific structure is located on the public beach, and

(i) constitutes an imminent hazard to safety, health, or public welfare; and/or

(ii) substantially interferes with the free and unrestricted right of the public to enter or leave the public beach or traverse any part of the public beach.

(B) A statement that the commissioner intends to notify the Texas Windstorm Insurance Association of a determination that the structure is not insurable property for purposes of Texas Insurance Code, §2210.004, effective upon the expiration of the current policy of windstorm insurance for the property that is the subject of the notice; and

(C) The person who constructs, maintains, controls, owns, or possesses the structure, improvement, obstruction, barrier, or hazard located on the public beach may submit, not later than the 30th day after the date on which the notice is served, written request for a hearing to contest the determination.

(2) The notice required in paragraph (1) of this subsection must be given:

(A) by service in person, by registered or certified mail, return receipt requested, or by priority mail; or

(B) if personal service cannot be obtained or the address of the person responsible is unknown, by posting a copy of the notice on the structure, improvement, obstruction, barrier, or hazard and by publishing notice in a newspaper with general circulation in the county in which the property is located at least two times in ten consecutive days.

(3) If the property owner requests a hearing, the commissioner must grant the hearing before an administrative law judge employed by the State Office of Administrative Hearings in accordance with the procedures outlined in the Open Beaches Act, §61.0184(g).

(c) If the property owner fails to request a hearing to contest the commissioner's determination or the commissioner makes an affirmative decision after notice and hearing, the commissioner shall notify the Texas Windstorm Insurance Association that the property is not insurable property for purposes of Texas Insurance Code, §2210.004, because of the factors listed in Subsection (h) of that section. The notice to the Texas Windstorm Insurance Association may provide that the determination is effective upon the expiration of the current policy of windstorm insurance for the property that is the subject of the notice.

§15.15. Criteria for Determining Health and Safety Hazards Associated with Structures on the Public Beach.

(a) The term "structure" as used in this section has the meaning assigned in §15.2(67) of this title (relating to Definitions) and includes any improvement, obstruction, barrier, or hazard on the public beach.

(b) In consideration of whether a structure on the public beach constitutes an imminent hazard to safety, health, or public welfare, the Commissioner of the General Land Office may consider public complaints, referrals from local government or state health and safety regulatory officials or site investigations by staff of the General Land Office that demonstrate the hazard to safety, health, or public welfare.

(c) An imminent hazard to safety, health or public welfare exists if the condition of the structure creates a probability of an individual coming into contact with any part of the structure or its related components and injury, illness, or disability is reasonably certain as a result of that contact or the condition of the structure and its related components creates a public nuisance.

(d) Examples of imminent hazards to safety, health, or public welfare include, but are not limited to:

(1) leaking sanitary sewer or septic systems;

(2) general unsanitary conditions;

(3) damaged structures;

(4) eroded foundations;

(5) structures with protrusions;

(6) debris on the beach, including material that is sharp or abrasive or that presents cutting, piercing, or tripping hazards;

(7) improperly managed waste and unmarked liquids;

(8) electrical shock hazards;

(9) utility services not in compliance with local codes; and

(10) interference with local government cleaning and maintenance activities, storm preparation and prevention, emergency response, or government erosion response projects.

§15.16. Criteria for Determining Substantial Interference with Access to and Use of the Public Beach by Structures on the Beach.

(a) The term "structure" as used in this section has the meaning assigned in §15.2(67) of this title (relating to Definitions) and includes any improvement, obstruction, barrier, or hazard on the public beach.

(b) In determining whether a structure located on the public beach constitutes a substantial interference with the free and unrestricted right of the public to enter or leave the public beach or traverse any part of the public beach, the Commissioner of the General Land Office must find that the structure or its related components causes an actual interference with the right of the public. Interference includes any circumstance that hampers, hinders, infringes, disturbs, or creates, additional burden or cost on the exercise of the right of the public to enter or leave the public beach or traverse any part of the public beach.

(c) Examples of substantial interference include, but are not limited to, circumstances where the structure or its related components:

(1) cause pedestrian or vehicular traffic to negotiate through debris or beneath an elevated structure;

(2) interfere with the use of special assistance devices or motorized vehicles on the public beach by disabled individuals;

(3) interfere with construction or use of dune walkovers because access thereto is blocked by a structure on the public beach;

(4) cause pedestrian or vehicular traffic to enter the water in order to traverse the beach at normal high tide;

(5) cause delay for emergency response vehicles; and

(6) cause increased costs for local governments in the cleaning and maintenance of the public beach.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 16, 2009.

TRD-200904679
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 475-1859

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PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 371. DRINKING WATER STATE REVOLVING FUND

SUBCHAPTER B. PROGRAM REQUIREMENTS

31 TAC §371.22

The Texas Water Development Board (Board) proposes amendments to 31 Texas Administrative Code (TAC) Chapter 371, Subchapter B, §371.22(a) and (c) regarding Administrative Cost Recovery.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE AMENDMENTS.

The American Recovery and Reinvestment Act of 2009 ("ARRA") provides a significant federal effort to jumpstart the economy and create or save millions of jobs by addressing long-neglected infrastructure projects. It is in the State's interest to assist in this effort and ensure that all projects receiving ARRA funding are "under contract or construction" prior to February 17, 2010. Any project not "under contract or construction" will have its ARRA funding revoked and funds reallocated to other states.

On September 17, 2009, the Board approved for adoption proposed amendments to: (a) 31 TAC Chapter 371 regarding the DWSRF; and (b) 31 TAC Chapter 375 regarding the CWSRF, to authorize special funding for provisional and partially funded projects impacted by the ARRA program. These adopted amendments allow the Executive Administrator to designate a project as "provisional" or "partially funded" ensuring that all funds administered under the ARRA DWSRF and CWSRF intended use plans ("IUP") will be under contract or supporting construction by the February 17, 2010 deadline. The September 17th Board rule adoption authorized 0.0% loan financing from the base CWSRF and DWSRF programs for those designated "provisional" and "partially funded" projects that failed to qualify for ARRA funding. However, these projects will be required to remit a loan origination fee which has been waived for ARRA-funded projects by prior action of the Board. The proposed rulemaking removes the loan origination fee for provisional and partially funded projects that benefit disadvantaged communities.

PROPOSED AMENDED RULES IN CHAPTER 371.

31 TAC §371.22(a) assesses charges for the purpose of recovering administrative costs for all projects receiving DWSRF loan assistance that receive binding commitments. However, currently §371.22(a) does not allow administrative costs to be recouped from those projects or portions of projects which receive subsidies in the form of forgiveness of loan principal pursuant to §371.24, relating to the Disadvantaged Community Program through Loan Subsidies. The proposed amendment would add disadvantaged communities which are designated as "provisional" or "partially funded" projects to §371.22(a) as identified under §371.207(c) and (d), and would disallow loan origination fees for these projects.

31 TAC §371.22(c) imposes a 2.25% loan origination charge on the DWSRF loan amount, excluding the amount of the origination charge. The loan origination charge is a one-time, nonrefundable charge that is due at the time of loan closing or may be financed as part of the DWSRF loan. The proposed amendment would specifically waive the 2.25% loan origination charge for DWSRF loans for disadvantaged communities which are designated as "provisional" or "partially funded" projects as identified under §371.207(c) and (d).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS.

Ms. Melanie Callahan, Chief Financial Officer, has determined that there will be no fiscal implications for local governments as a result of the proposed rulemaking. Ms. Callahan has determined there will be some fiscal impact to the DWSRF, but the proposed rulemaking should not materially affect the TWDB's ability to provide financing for DWSRF projects.

PUBLIC BENEFITS AND COSTS.

Ms. Amanda Lavin, Deputy Executive Administrator for Project Finance, also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking because it enhances the ability of the Board to fully commit the American Recovery and Reinvestment Act of 2009 federal grant monies under the Drinking Water State Revolving Fund and will impose no new requirements on the public or persons required to comply with the rules.

LOCAL EMPLOYMENT IMPACT STATEMENT.

The Board has determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect because it will impose no new requirements on local economies.

The Board has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The Board has also determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY IMPACT ANALYSIS.

The Board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT.

The Board has determined that the promulgation and enforcement of these proposed rule amendments will constitute neither a statutory nor a constitutional taking of private real property.

The proposed rule amendments do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because these proposed rule amendments do not burden or restrict or limit the owner's right to property. Therefore, the proposed amendments do not constitute a taking under Texas Government Code, Chapter 2007.

SUBMITTAL OF COMMENTS.

Comments on the proposed rulemaking will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.state.tx.us,* or by fax at (512) 463-5580.

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

Cross reference to statute: Texas Water Code Chapters 15, 16, and 17.

§371.22. Administrative Cost Recovery.

(a) General. The board will assess charges for the purpose of recovering administrative costs of all projects receiving DWSRF loan assistance, except those projects or portions of projects which receive subsidies in the form of forgiveness of loan principal pursuant to §371.24 of this title (relating to Disadvantaged Community Program through Loan Subsidies) and those disadvantaged communities which are designated as provisional or partially funded projects under §371.207(c) and (d) of this title (relating to Lending Rates), and which receive binding commitments after the effective date of this section.

(b) (No change.)

(c) Loan Origination Charge. A loan origination charge will be assessed of 2.25% of the DWSRF loan amount, excluding the amount of the origination charge, except for those loan amounts for disadvantaged communities which are designated as provisional or partially funded projects under §371.207(c) and (d) of this title. The loan origination charge is a one-time non-refundable charge that is due and payable at the time of loan closing. The loan origination charge may be financed as a part of the DWSRF loan.

(d) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

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Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 463-8061

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CHAPTER 375. CLEAN WATER STATE REVOLVING FUND
SUBCHAPTER A. GENERAL PROVISIONS
DIVISION 2. PROGRAM REQUIREMENTS

31 TAC §375.18

The Texas Water Development Board (Board) proposes amendments to 31 Texas Administrative Code (TAC) Chapter 375, Subchapter A, §375.18, regarding Administrative Cost Recovery.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE AMENDMENTS.

The American Recovery and Reinvestment Act of 2009 (ARRA) provides a significant federal effort to jumpstart the economy and create or save millions of jobs by addressing long-neglected infrastructure projects. It is in the State's interest to assist in this effort and ensure that all projects receiving ARRA funding are "under contract or construction" prior to February 17, 2010. Any project not "under contract or construction" will have its ARRA funding revoked and funds reallocated to other states.

On September 17,2009, the Board approved for adoption proposed amendments to: (a) 31 Texas Administrative Code Chapter 371 regarding the DWSRF; and (b) 31 Texas Administrative Code Chapter 375 regarding the CWSRF, to authorize special funding for provisional and partially funded projects impacted by the ARRA program. These adopted amendments allow the Executive Administrator to designate a project as "provisional" or "partially funded" ensuring that all funds administered under the ARRA DWSRF and CWSRF intended use plans (IUP) will be under contract or supporting construction by the February 17, 2010 deadline. The September 17th Board rule adoption authorized 0.0% loan financing from the base CWSRF and DWSRF programs for those designated "provisional" and "partially funded" projects that failed to qualify for ARRA funding. However, these projects will be required to remit a loan origination fee which has been waived for ARRA-funded projects by prior action of the Board. The proposed rulemaking removes the loan origination fee for provisional and partially funded projects that benefit disadvantaged communities.

PROPOSED AMENDED RULES IN CHAPTER 375.

31 TAC §375.18(a) assesses charges for the purpose of recovering administrative costs for all projects receiving CWSRF loan assistance that receive binding commitments. Unlike the DWSRF program, the CWSRF program does not provide for any exceptions to this charge. The proposed amendment would provide for an exception and would disallow charges from being assessed for disadvantaged communities which are designated as "provisional" or "partially funded" as identified under §375.407(c) and (d).

31 TAC §375.18(c) imposes a loan origination charge on the CWSRF loan amount, excluding the amount of the origination charge. The Board routinely imposes a 1.85% loan origination charge on projects seeking CWSRF financial assistance. The loan origination charge is a onetime, non-refundable charge that is due at the time of loan closing or may be financed as part of the CWSRF loan. The proposed amendment would specifically waive the loan origination charge for CWSRF loans for disadvantaged communities which are designated as "provisional" or "partially funded" projects as identified under §375.407(c) and (d).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS.

Ms. Melanie Callahan, Chief Financial Officer, has determined that there will no fiscal implications for local governments as a result of the proposed rulemaking. Ms. Callahan has determined there will be some fiscal impact to the CWSRF, but the proposed rulemaking should not materially affect the Board's ability to provide financing for CWSRF projects.

PUBLIC BENEFITS AND COSTS.

Ms. Amanda Lavin, Deputy Executive Administrator for Project Finance, also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking because it enhances the ability of the Board to fully commit the ARRA of 2009 federal grant monies under the Clean Water State Revolving Fund and will impose no new requirements on the public or persons required to comply with the rules.

LOCAL EMPLOYMENT IMPACT STATEMENT.

The Board has determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect because it will impose no new requirements on local economies.

The Board has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The Board has also determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY IMPACT ANALYSIS.

The Board has determined that the proposed rulemaking is not subject to Texas Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT.

The Board has determined that the promulgation and enforcement of these proposed rule amendments will constitute neither a statutory nor a constitutional taking of private real property. The proposed rule amendments do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because these proposed rule amendments do not burden or restrict or limit the owner's right to property. Therefore, the proposed amendments do not constitute a taking under Texas Government Code, Chapter 2007.

SUBMITTAL OF COMMENTS.

Comments on the proposed rulemaking will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.state.tx.us,* or by fax at (512) 463-5580.

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

Cross reference to statute: Texas Water Code Chapters 15, 16, and 17.

§375.18. Administrative Cost Recovery.

(a) General. The board will assess charges for the purpose of recovering administrative costs of all recipients of CWSRF financial assistance who receive commitments after the effective date of this section, except those disadvantaged communities which are designated as provisional or partially funded projects under §375.407(c) and (d) of this title (relating to Lending Rates).

(b) (No change.)

(c) Loan origination charge. A loan origination charge will be assessed of the CWSRF loan amount, excluding the amount of the origination charge, except for those loan amounts for disadvantaged communities which are designated as provisional or partially funded projects under §375.407(c) and (d) of this title. The loan origination charge is a one-time charge that is due at the time of loan closing. The loan origination charge may be financed as a part of the CWSRF loan.

(d) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904695
Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.582

The Comptroller of Public Accounts (comptroller) proposes an amendment to §3.582, concerning margin: passive entities.

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

The definition of federal gross income in subsection (b)(3) that references Internal Revenue Code, §61(a) is deleted and new language is added to define federal gross income as the income

that is reported on an entity's federal income tax return, to the extent the amount reported complies with federal income tax law. The amended definition more accurately reflects our current policy.

Subsection (c)(2)(B) and (d)(1) are amended to state that, effective for reports originally due on or after January 1, 2010, rental income that flows from a partnership to a partner is not passive income.

Language is added to subsection (e) to clarify that passive income only includes income received from an investment, as opposed to income received from an entity's operations.

Subsection (g) is expanded to clarify the reporting requirements for passive entities. New paragraph (1) is added to clarify that only a passive entity that has notified the comptroller or secretary of state that it is doing business in Texas must file an information report the first year that it qualifies as passive and is not required to file a subsequent report, as long as the entity continues to qualify as passive. New paragraph (2) is added to clarify that a passive entity that has not notified the comptroller or the secretary of state that it is doing business in Texas will not be required to register with or file a franchise tax report with the comptroller's office. New paragraph (3) is added to clarify that any passive entity that no longer qualifies as passive must file a franchise tax report for the period in which the entity does not qualify as passive, and any subsequent periods, until the entity once again files as a passive entity. New paragraph (4) states that an entity that receives notification from the comptroller asking if the entity is taxable must reply to the comptroller within 30 days of the notice.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by clarifying the definition of passive income and the reporting requirements for passive entities. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.0003.

§3.582. Margin: Passive Entities.

(a) Effective Date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008, except as otherwise noted.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Active trade or business--For the purposes of this section only:

(A) an entity conducts an active trade or business if the activities include active operations that form a part of the process of earning income or profit, and the entity performs active management and operational functions;

(B) activities performed by the entity include activities performed by persons outside the entity, including independent contractors, to the extent that the persons perform services on behalf of the entity and those services constitute all or part of the entity's trade or business; or

(C) an entity conducts an active trade or business if assets, including royalties, patents, trademarks, and other intangible assets, held by the entity are used in the active trade or business of one or more related entities.

(2) Business trust--An entity as defined by Internal Revenue Code, Treasury Regulation, §301.7701-4(b).

(3) Federal gross income--Income that is reported on the entity's federal income tax return, to the extent the amount reported complies with federal income tax law [~~Gross income as defined in Internal Revenue Code, §61(a)~~].

(4) General partnership--A partnership as described in Revised Partnership Act, Article 6132b-1.01 et. seq., or Business Organizations Code, Title 4, Chapter 152, or an equivalent statute in another jurisdiction.

(5) Limited liability partnership--A partnership registered pursuant to Revised Partnership Act, Article 6132b-3.08, or Business Organizations Code, Title 4, Chapters 152 and 153, Subchapter H, or an equivalent statute in another jurisdiction.

(6) Limited partnership--A partnership formed pursuant to Revised Partnership Act, Article 6132a-1, or Business Organizations Code, Title 4, Chapter 153, or an equivalent statute in another jurisdiction.

(7) Net capital gains--Net capital gains as defined under the Internal Revenue Code.

(8) Net gains--Net gains as defined under the Internal Revenue Code.

(9) Non-controlling interest--For the purposes of this section only, an interest that is less than or equal to 50% that is held by an investor, either directly or indirectly, in an investee.

(10) Security--

(A) an instrument defined by Internal Revenue Code, §475(c)(2), where the holder of the instrument has a non-controlling interest in the issuer/investee;

(B) an instrument described by Internal Revenue Code, §475(e)(2)(B), (C), (D);

(C) an interest in a partnership where the investor has a non-controlling interest in the investee;

(D) an interest in a limited liability company where the investor has a non-controlling interest in the investee; or

(E) a beneficial interest in a trust where the investor has a non-controlling interest in the investee.

(c) Qualification as a passive entity:

(1) to qualify as a passive entity, the entity must be one of the following for the entire period on which the tax is based:

(A) general partnership;

(B) limited partnership;

(C) limited liability partnership; or

(D) trust, other than a business trust; and

(2) at least 90% of an entity's federal gross income for the period on which margin is based must consist of the following sources of income:

(A) dividends, interest, foreign currency exchange gain, periodic and nonperiodic payments with respect to notional principal contracts, option premiums, cash settlements or termination payments with respect to a financial instrument, and income from a limited liability company;

(B) distributive shares of partnership income to the extent that those distributive shares of income are greater than zero, excluding rental income for reports originally due on or after January 1, 2010 (see subsection (d)(1) of this section);

(C) net capital gains from the sale of real property, net gains from the sale of commodities traded on a commodities exchange, and net gains from the sale of securities; and

(D) royalties from mineral properties, bonuses from mineral properties, delay rental income from mineral properties and income from other nonoperating mineral interests including nonoperating working interests not described in subsection (d)(2) of this section.

(d) The income described by subsection (c)(2) of this section, does not include:

(1) rent including, for reports originally due on or after January 1, 2010, rental income that flows from a partnership to a partner; or

(2) income received by a nonoperator from mineral properties under a joint operating agreement if the nonoperator is a member of an affiliated group and another member of that group is the operator under the same joint operating agreement.

(e) Conducting an active trade or business. To be considered a passive entity, an entity may not receive more than 10% of its federal gross income for the period on which margin is based from conducting an active trade or business. Income described by subsection (c)(2) of this section, may not be treated as income from conducting an active trade or business, if the income is not part of the receiving entity's operations and is merely an investment. If the investment is in another entity, the investing entity or an affiliated entity or individual, may not control the investee. For example, if a partnership buys bonds issued by an entity, interest income from the bonds would be considered passive income. However, if a partnership is in the business of making loans, interest income from the loans would not be considered passive income.

(f) Activities that do not constitute an active trade or business:

(1) ownership of a royalty interest or a nonoperating working interest in mineral rights;

(2) payment of compensation to employees or independent contractors for financial or legal services reasonably necessary for the operation of the entity; and

(3) holding a seat on the board of directors of an entity does not, by itself, constitute conduct of an active trade or business.

(g) Reporting requirement for a passive entity. If an entity meets all of the qualifications of a passive entity for the reporting period, the entity will owe no tax; however, the entity may be required to file an information report subject to the following paragraphs: [~~must file information to verify that the passive entity qualifications are met each year.~~]

(1) A partnership or trust that is registered with the comptroller's office or with the secretary of state's office must file an information report as a passive entity for the first report that it qualifies as passive. An entity that has filed as passive on a previous report will not be required to file subsequent franchise tax reports, as long as the entity continues to qualify as passive.

(2) A partnership or trust that qualifies as a passive entity for the period upon which the franchise tax report is based, and is not registered with the comptroller's office or with the secretary of state's office, will not be required to register with or file a franchise tax report with the comptroller's office.

(3) Any passive entity, whether or not it is registered with the comptroller's office or with the secretary of state's office, that no longer qualifies as passive, must register with the comptroller's office and file a franchise tax report for the period in which the entity does not qualify as passive, and any subsequent periods, until the entity once again files with the comptroller's office as a passive entity.

(4) If a passive entity receives notification in writing from the comptroller asking if the entity is taxable, the entity must reply to the comptroller within 30 days of the notice.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 16, 2009.

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Ashley Harden
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

34 TAC §3.583

The Comptroller of Public Accounts proposes an amendment to §3.583, concerning margin: exemptions.

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

Language is added to subsection (d)(5) to broaden printed publication to include electronic media.

Subsection (l) is added to implement House Bill 1474, 81st Legislature, 2009. Effective for reports originally due on or after October 1, 2009, a bingo unit formed under Occupations Code, Chapter 2001, Subchapter I-1, is exempt from the tax imposed under Tax Code, Chapter 171.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by clarifying franchise tax exemption requirements and by implementing legislation extending

the exemption to certain bingo operations. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Occupations Code, §2001.4335.

§3.583. Margin: Exemptions.

(a) Effective date. This section applies to franchise tax reports originally due on or after January 1, 2008, except as otherwise noted.

(b) Application for exemption. An entity that has not previously established an exemption from franchise tax with the comptroller must apply for an exemption. An entity that is not a corporation, but whose activities would qualify it for a specific exemption under Tax Code, Chapter 171, Subchapter B, if it were a corporation, may qualify for the exemption from the tax in the same manner and under the same conditions as a corporation. See Tax Code, §171.088. For provisional exemptions for certain entities, see subsection (i) of this section; for trade show exemptions, see subsection (j) of this section.

(1) An entity that believes it is exempt from payment of franchise tax must furnish to the comptroller sufficient evidence to establish its exempt status. The entity claiming the exemption bears the burden to establish its entitlement to exempt status and any doubts will result in a denial of the application for exemption.

(2) Except as otherwise provided in subsections (f), (i), and (j) of this section, each entity must submit to the comptroller:

(A) a request for exemption in writing, which may require using forms developed by the comptroller for requesting exemptions, indicating the particular provision of Tax Code, Chapter 171, under which exemption is claimed;

(B) a detailed statement of the entity's past and current activities, if any, and its future plan of activities, both in relation to the manner in which the entity adopts to implement the purposes clause in its certificate of formation or application for registration;

(C) an entity formed or created under Texas law whose articles of organization or formation is on file with the Texas Secretary of State need not submit copies of those documents with its request for exemption. A Texas entity that is not required to file organizational documents with the Texas Secretary of State must furnish a signed and dated copy of its organizational documents with its exemption request. If a non-Texas entity is required to file articles of organization or formation with its home jurisdiction Secretary of State, or other designated agency or officer, the entity must provide file-stamped copies of those filed organizational or formation documents. If a non-Texas entity is not required to file its articles of organization with the Secretary of State or other authority of its home jurisdiction, it must furnish a signed and dated copy of its organizational or formation documents with its exemption request; and

(D) any additional information the comptroller may require to make a determination whether the entity is eligible for a franchise tax exemption.

(c) Actions by comptroller. Upon receipt of an application for exemption, the comptroller's representative will review the application and send the applicant a notification either granting the exemption or denying the exemption, or requesting additional information.

(1) If the exemption is granted, the exemption will be effective from the first date the entity was eligible for exemption. If the entity paid any franchise taxes prior to the comptroller's notification granting the exemption for a privilege period after the effective date of the exemption, the entity may request a refund, subject to the applicable statute of limitations. If the effective date of the exemption occurs after the beginning of a privilege period, the entity must pay through the end of such privilege period. An entity that has been subject to the tax and becomes eligible for exemption is liable for Tax Code, §171.0011, additional tax.

(2) If the exemption is denied or revoked, the entity may contest the denial or revocation by filing all reports due as required by the comptroller; and

(A) paying all amounts of tax, penalty, and interest due and requesting a refund hearing pursuant to the provisions of Tax Code, Chapter 111;

(B) paying all amounts of tax, penalty, and interest due, accompanying the payment with a written protest, and filing suit for the recovery of amounts paid pursuant to the provisions of Tax Code, Chapter 112; or

(C) requesting a redetermination hearing pursuant to Tax Code, §111.009, if the comptroller issues a deficiency determination.

(d) Qualification for exemption.

(1) Entities subject to insurance premium taxes. All insurance, surety, guaranty, fidelity and title insurance companies, title insurance agents, and other insurance organizations that are subject to the annual gross premiums tax levied by Insurance Code, Chapters 221 - 224, are exempt from payment of the franchise tax, regardless of whether any gross premiums taxes are actually paid in any given year. A non-admitted insurance company or organization that is required to pay a gross premium receipts tax during a tax year is exempted from the franchise tax for the same tax year. The exemption in this paragraph covers the periods upon which the franchise tax is based, provided the gross premium receipts tax is required to be paid on premiums received or written, as applicable, during the same period. For example, an insurance organization's gross premium receipts tax is due and payable on March 1, 2009, for premiums received during calendar year 2008. The entity would be exempt from franchise tax for the 2009 annual report covering the January 1, 2009 - December 31, 2009, privilege period, for margin attributable to calendar year 2008. An entity is subject to the franchise tax, however, for a tax year in any portion of which it is in violation of an order issued by the Texas Department of Insurance under Insurance Code, §2254.003(b) that is final after appeal or that is no longer subject to appeal.

(2) Those entities organized for the exclusive purpose of promoting the public interest of any county, city, town, or other area within the state, must show that promotion of the public interest is the exclusive purpose of the entity and not merely an incidental result. An entity will not be considered to be promoting the public interest if it engages in activities to promote or protect the private, business, or professional interests of its members or patronage.

(3) A nonprofit entity seeking franchise tax exemption as a religious organization must be an organized group of people regularly meeting for the primary purpose of holding, conducting, and sponsoring religious worship services according to the rites of their sect. The

entity must be able to provide evidence of an established congregation showing that there is an organized group of people regularly attending these services. An entity that supports and encourages religion as an incidental part of its overall purpose, or one whose general purpose is furthering religious work or instilling its membership with a religious understanding, will not qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of entities that do not meet the requirements for exemption under this definition are conventions or associations of churches, evangelistic associations, churches with membership consisting of family members only, missionary organizations, and groups that meet for the purpose of holding prayer meetings, Bible study or revivals. Although these organizations do not qualify for exemption under this category of exemption as religious organizations, they may qualify for the exemption under Tax Code, §171.063, if they obtain an exemption from the Internal Revenue Service (IRS) under Internal Revenue Code (IRC), §501(c).

(4) A nonprofit entity seeking a franchise tax exemption as organized for purely public charity must devote all or substantially all of its activities to the alleviation of poverty, disease, pain, and suffering by providing food, clothing, drugs, treatment, shelter, or psychological counseling directly to indigent or similarly deserving members of society with its funds derived primarily from sources other than fees or charges for its services. If an entity engages in any substantial activity other than the activities that are described in this paragraph, it will not be considered as having been organized for purely public charity, and therefore, will not qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are fraternal organizations, lodges, fraternities, sororities, service clubs, veterans groups, mutual benefit or social groups, professional groups, trade or business groups, trade associations, medical associations, chambers of commerce, and similar organizations. Even though not organized for profit and performing services that are often charitable in nature, these types of organizations do not meet the requirements for exemption under this provision. Although these organizations do not qualify for exemption under this category of exemption as charitable organizations, they may qualify for the exemption under Tax Code, §171.063, if they obtain an exemption from the IRS under IRC, §501(c).

(5) A nonprofit entity seeking a franchise tax exemption as an educational organization must show that its activities are devoted solely to systematic instruction, particularly in the commonly accepted arts, sciences, and vocations, and has a regularly scheduled curriculum, using the commonly accepted methods of teaching, a faculty of qualified instructors, and an enrolled student body or students in attendance at a place where the educational activities are regularly conducted. An entity that has activities consisting solely of presenting public discussion groups, forums, panels, lectures, or other similar programs, may qualify for exemption under this provision, if the presentations provide instruction in the commonly accepted arts, sciences, and vocations. The entity will not be considered for exemption under this provision if the systematic instruction or educational classes are incidental to some other facet of the organization's activities. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are professional associations, business leagues, information resource groups, research organizations, support groups, home schools, and organizations that merely disseminate information via tangible or electronic media [~~by distributing printed publications~~]. Although these organizations do not qualify for exemption under this category of exemption as educational organizations, they may qualify for the exemption under Tax Code, §171.063, if they obtain an exemption from the IRS under IRC, §501(c).

(6) A nonprofit entity requesting franchise tax exemption as a homeowners' association must prove that it meets all requirements to qualify for the exemption. The entity must show that it is organized and operated to obtain, manage, construct, and maintain the property in or of a residential condominium or residential real estate development. The entity also must prove that the condominium project, or, for a real estate development, the related property, is legally restricted for use as residences. Furthermore, the entity must establish that the collective resident owners of individual lots, residences or units control at least 51% of the votes of the entity and that voting control, however acquired, is not held by: a single individual or family; one or more developers, declarants, banks, investors, or other similar parties. For example, an association is formed for a residential condominium consisting of 12 units with each unit being entitled to one vote. Each of five individuals separately owns and occupies one unit, a total of five units. A sixth individual owns two units, living in one unit and leasing the other. A seventh individual owns and leases the remaining five units. None of the owners are related. In determining whether the collective resident owners control at least 51% of the votes of the organization, the sixth owner is a resident owner regarding the one unit in which the owner lives and an investor regarding the other. The collective resident owners, therefore, have a total of six votes. Consequently, since the collective resident owners only have 50% of the votes of the entity, the association does not meet the requirement that the resident owners must control at least 51% of the votes of the organization. Accordingly, the entity does not qualify for the franchise tax exemption as a homeowners' association.

(e) Revocation, withdrawal, or loss of exemptions.

(1) An entity that no longer qualifies for the franchise tax exemption is required to notify the comptroller in writing of its change in status. Except as provided in paragraph (2) of this subsection, if at any time the comptroller has reason to believe that an exempt entity no longer qualifies for exemption, the comptroller's representative will notify the entity that its exempt status is under review. The comptroller's representative may request additional information necessary to ascertain the continued validity of the entity's exempt status. If the comptroller determines that an entity is no longer entitled to its exemption, notification to that effect will be sent to the entity. The effective date of revocation is the date the entity no longer qualified for the exemption. The day immediately following the date of withdrawal, loss, or revocation shall be the beginning date for determining the entity's privilege period and for all other purposes related to franchise tax.

(2) For nonprofit entities granted an exemption under Tax Code, §171.063, the revocation, withdrawal, or loss of the federal income tax exemption automatically terminates the franchise tax exemption. A nonprofit entity that no longer qualifies for the federal income tax exemption which was the basis for obtaining the franchise tax exemption must notify the comptroller in writing within 30 days of its change in status and must provide a copy of the notice of such revocation, withdrawal, or loss. The effective date of withdrawal or loss is the date of withdrawal or loss of the federal tax exemption. The effective date of a revocation is the date the IRS serves written notice of the revocation to the non-profit entity or the date the IRS serves written notice of revocation to the comptroller, whichever is earlier. The day immediately following the date of withdrawal, loss, or revocation shall be the entity's beginning date for determining its privilege periods and for all other purposes of the franchise tax.

(3) An electric cooperative entity previously exempted from franchise tax under Tax Code, §171.079, that subsequently participates in a joint powers agency thereby loses its franchise tax exemption. The commencing date of participation in the joint powers agency shall be considered the entity's beginning date for purposes of determining the entity's privilege periods and for all other purposes of the franchise tax. The electric cooperative must notify the comptroller in writing that it is a participant in a joint powers agency within 30 days after the commencing date of its participation.

(f) Federal exemption. An entity meeting the requirements of any paragraph of this subsection establishes its exempt status by furnishing to the comptroller a copy of a current exemption letter from the IRS.

(1) A nonprofit entity that has been exempted from federal income tax under the provisions of IRC, §501(c)(3) - (10), (19); or

(2) any entity that has been exempted from federal income tax under the provisions of IRC, §501(c)(2) or (25), if the entity or entities for which it holds title to property are either exempt from or not subject to the franchise tax; and

(3) any entity that has been exempted from federal income tax under IRC, §501(c)(16).

(g) Solar energy device. For purposes of Tax Code, §171.056, the term "solar energy device" includes, but is not limited to:

(1) devices used in the conversion of solar thermal energy into electrical or mechanical power;

(2) devices used in the photovoltaic (solar cell) generation of electricity;

(3) systems used in the heating of water and the heating and cooling of structures by use of solar collectors to gather the sun's energy; and

(4) heat pumps used as an integral part of a system designed to make the best combined use of solar energy and conventional heating.

(h) Exemption for recycling operation. An entity engaged solely in the business of recycling sludge as defined by Health and Safety Code, Chapter 361, Solid Waste Disposal Act, §361.003, is exempt from franchise tax.

(i) Provisional exemptions.

(1) If established with the comptroller, the following entities may be granted a temporary exemption from franchise tax:

(A) a nonprofit entity that has applied for exemption from federal income tax under IRC, §501(c)(3) - (10), (19); or

(B) an entity that has applied for exemption from federal income tax under IRC, §501(c)(2) or (25), if the entity or entities for which it holds title to property is either exempt from or not subject to the franchise tax; and

(C) an entity that has applied for exemption from federal income tax under IRC, §501(c)(16).

(2) To obtain a temporary franchise tax exemption with the comptroller, an entity that has applied for but has not yet received a letter of exemption from the IRS must timely file with the comptroller:

(A) a copy of the application for recognition of exemption that has been filed with the IRS; and

(B) a copy of:

(i) a written notice from the IRS stating that the application for recognition of exemption has been received; or

(ii) a receipt as proof that the application has been sent to the IRS by means of the United States Postal Service, other carrier, or hand delivery to the IRS.

(3) Paragraphs (2)(A) and (2)(B)(ii) of this subsection, apply only if the organization has filed its application for recognition of exemption during the 14th or 15th month after its beginning date. Beginning date means:

(A) for an entity organized under the laws of this state, the date on which the entity's certificate of formation or other similar document takes effect; and

(B) for a foreign entity, the date on which the entity begins doing business in this state.

(4) If the information required in paragraphs (2)(A) and [~~(2)~~](B)(i) of this subsection is provided in a timely manner, a 90-day provisional franchise tax exemption will be granted.

(5) An entity qualifying under paragraphs (2)(A) and [~~(2)~~](B)(ii) of this subsection, will be granted a 90-day provisional exemption with the condition that a copy of the notice required in paragraph (2)(B)(i) of this subsection be provided to the comptroller within 30 days from the date of the letter notifying the entity of the provisional exemption. If the IRS notification is not provided within the 30-day period, the provisional exemption will be canceled. An entity whose provisional exemption is canceled will be subject to all tax, penalty, and interest that has accrued since the entity's beginning date.

(6) The information necessary for obtaining a temporary franchise tax exemption will be considered to be provided to the comptroller in a timely manner if:

(A) the application for recognition of exemption is provided to the IRS within their timely filing guidelines; and

(B) the information required in paragraphs (2)(A) and [~~(2)~~](B)(i) or [~~(2)~~](B)(ii) of this subsection, is postmarked within 15 months after the day that is the last day of a calendar month and that is nearest to the entity's beginning date.

(7) Before the expiration of the 90-day provisional exemption, the entity must provide the comptroller a copy of the letter from the IRS showing that the decision on the federal exemption is still pending or stating that the federal exemption is either granted or denied.

(8) If the comptroller is notified as required in paragraph (7) of this subsection, that the decision on the federal exemption is still pending, an extension of the provisional exemption may be considered.

(9) If the information in paragraph (7) of this subsection, is not provided as required, the provisional exemption may be canceled. If the provisional exemption is canceled, the entity will be responsible for all franchise tax reports and payments that have become due since its beginning date, and penalty and interest will be based on the original due date of each report.

(10) An entity that provides the comptroller a copy of the letter from the IRS stating that the federal exemption has been granted will be considered for franchise tax exemption under subsection (f) of this section.

(11) If the federal exemption is denied by the IRS, the entity is responsible for all franchise tax reports and payments that have become due since its beginning date and interest will be based on the original due date of each report. Late filing and payment penalties will

be waived for any reports and payments postmarked within 90 days after the date of the final denial of the federal exemption. The penalty waiver process will begin when the entity submits a written request for penalty waiver and a copy of the letter denying the federal exemption when filing reports and payment.

(j) Trade show exemption. See Tax Code, §171.084, for the requirements for exemption for certain foreign entities that participate in trade shows in Texas.

(1) Notification to comptroller. Entities need not apply for an exemption under Tax Code, §171.084.

(A) If a foreign entity has obtained a registration or has already notified the comptroller that it is doing business in Texas, the entity must notify the comptroller in writing by the due date of the first report for which the entity is exempt that the report and payment are not due because the entity is exempt under Tax Code, §171.084. After such notification, the entity must notify the comptroller in writing only when the organization no longer qualifies for exemption.

(B) If a foreign entity has not obtained a registration or otherwise qualified to do business in the state, if applicable, and if the entity has not notified the comptroller that it is doing business in Texas, the entity must notify the comptroller in writing only when the entity no longer qualifies for exemption under Tax Code, §171.084. There is no need to apply for exemption as long as the entity qualifies for the exemption.

(2) Solicitation periods. If the solicitation of orders is conducted during more than five periods during the business period upon which tax is based as set out in Tax Code, §171.1532, the entity does not qualify for exemption.

(A) An entity with its fiscal year ending December 31, 2008, that filed a 2008 annual report, will not have to file and pay a 2009 annual report if it did not solicit orders for more than five periods during 2008.

(B) Assume a foreign entity participated in its first trade show in Texas on April 1, 2008. It also participated in trade shows in 2009 on January 1, March 1, May 1, June 1, August 1, and October 1. The entity's fiscal year ends are December 31, 2008, and 2009. The entity would be exempt for its initial report and payment (covering the privilege periods from April 1, 2008 - December 31, 2009) because it only solicited for one period from April 1, 2008 - December 31, 2008 (i.e., the business upon which the initial report is based). The entity would be required to file a 2010 annual report and pay tax, however, because it solicited for six periods from January 1, 2009 - December 31, 2009 (i.e., the period upon which the 2010 annual report is based).

(3) One hundred twenty hours. A solicitation period may not exceed 120 consecutive hours. If the solicitation of orders is conducted during a single period of more than 120 consecutive hours, the entity does not qualify for exemption. For example, an entity that meets the other requirements of Tax Code, §171.084, will meet the 120 hours requirement if the solicitation occurs Monday - Friday, but will not meet the 120 hours requirement if the solicitation occurs Monday - Saturday. If none of the solicitation limits prescribed in this subsection are exceeded, an entity may qualify for the exemption even if it leases space at a wholesale center for the entire period upon which the tax is based.

(k) An entity organized under 12 U.S.C. §2071, or an agricultural credit association regulated by the Farm Credit Administration is exempt from franchise tax.

(l) Bingo unit exemption. For reports originally due on or after October 1, 2009, a bingo unit formed under Occupations Code, Chapter 2001, Subchapter I-1, is exempt from franchise tax. "Unit" means two or more licensed authorized organizations that conduct bingo at the same location joining together to share revenues, authorized expenses, and inventory related to bingo operation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 16, 2009.

TRD-200904649
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 475-0387

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34 TAC §3.584

The Comptroller of Public Accounts proposes an amendment to §3.584, concerning margin: reports and payments.

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

Subsection (c)(1) is amended to reflect a change in policy regarding the initial report due date for entities that become subject to the Texas franchise tax on or after October 4, 2009. For these entities, an annual report is the first franchise tax report that a taxable entity will file.

Language is added to subsection (d)(3)(B) to clarify that, for determining if the retail tax rate applies, a product is not considered to be produced if modifications made to the acquired product do not increase the sales price of the product by more than 10%.

Subsection (d)(4) on annualized total revenue is amended to delete the figure $300,000 from the no tax due threshold. House Bill 4765, 81st Legislature, 2009, increases the no tax due threshold to $1 million for reports due on or after January 1, 2010 and to $600,000 for reports due on or after January 1, 2012. Annualized total revenue examples in subsection (d)(4)(A) and (B) are updated to reflect the increase in the no tax due threshold.

Subsection (d)(5) is amended to implement House Bill 4765, 81st Legislature, 2009, which increases the no tax due threshold to $1 million for reports due on or after January 1, 2010 and to $600,000 for reports due on or after January 1, 2012. Subsection (d)(5) is also amended to allow combined groups to file a no tax due information report.

Subsection (d)(6) is amended to adjust the discounts due to the increase in the no tax due threshold and to correct punctuation.

Subsection (d)(8)(A) is amended to clarify that neither the upper tier entity nor the lower tier entity in a tiered partnership arrangement qualifies for no tax due, discounts and the E-Z Computation if, before the attribution of any total revenue by a lower tier entity to upper tier entities, the lower tier entity does not meet the criteria. Subsection (d)(8)(B) is amended to include additional information requested on the Tiered Partnership Report. Titles have also been added to both subparagraphs.

First annual report has been added to the list of reports in subsection (i)(1) and (i)(2) that must include an information report.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by updating the rule to reflect legislative provisions from the 81st Legislature, 2009, and by clarifying the provisions for tiered entities. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§171.0021, 171.101, 171.1015, 171.1016, 171.202, and 171.203.

§3.584. Margin: Reports and Payments.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008, except as otherwise noted.

(b) Nontaxable entities. See §3.581 of this title (relating to Margin: Taxable and Nontaxable Entities) for information concerning nontaxable entities. Except for passive entities (see §3.582 (relating to Margin: Passive Entities)), a nontaxable entity that has not notified the comptroller or the secretary of state that it is doing business in Texas, or that has previously notified the comptroller that it is not taxable, must notify the comptroller in writing only when the entity no longer qualifies as a nontaxable entity. If an entity receives notification in writing from the comptroller asking if the entity is taxable, the entity must reply to the comptroller within 30 days of the notice.

(c) Reports and due dates.

(1) Each taxable entity subject to the franchise tax levied by Tax Code, §171.001, with a beginning date of October 4, 2009, or later, must file a first annual franchise tax report, and thereafter an annual franchise tax report, and at the same time must pay the franchise tax and any applicable penalties and interest due by the taxable entity. Each taxable entity subject to the franchise tax levied by Tax Code, §171.001, with a beginning date prior to October 4, 2009, must file an initial franchise tax report, and thereafter an annual franchise tax report, and at the same time must pay the franchise tax and any applicable penalties and interest due by the taxable entity. It is the responsibility of a receiver to file franchise tax reports and pay the franchise tax of a taxable entity in receivership. A debtor in possession or the appointed trustee or receiver of a taxable entity in reorganization or arrangement proceedings under the Bankruptcy Act is responsible for filing franchise tax reports and paying the franchise tax pursuant to the plan of reorganization or arrangement.

(A) "Beginning date" means:

(i) for a taxable entity chartered or organized in this state, the date on which the taxable entity's charter or organization takes effect; and

(ii) for a foreign taxable entity, the date on which the taxable entity begins doing business in this state.

(B) Initial report. For taxable entities with a beginning date prior to October 4, 2009, both [~~Both~~] the initial report and payment of the tax due, if any, are due no later than 89 days after the first anniversary date of the beginning date. The taxable margin computed on the initial report is based on the business done during the period beginning on the beginning date and ending on the last accounting period ending date for federal income tax purposes that is at least 60 days before the original due date of the initial report, or, if there is no such ending date, then ending on the day that is the last day of the calendar month nearest to the end of the taxable entity's first year of business. If the period used to compute business done for purposes of the initial report differs from the taxable entity's last accounting period for federal income tax purposes, then the taxable entity's total revenue for purposes of the initial report shall be computed as if the taxable entity had reported its federal taxable income on an Internal Revenue Service form covering the period used to compute business done for purposes of the initial report. The privilege period for the initial report is from the beginning date through December 31 of the year in which the initial report is originally due.

(C) Annual report.

(i) First annual report. For taxable entities with a beginning date of October 4, 2009, or later, both the first annual report and payment of the tax due, if any, are due no later than May 15 of the year following the year the entity became subject to the tax (i.e., the beginning date). The taxable margin computed on the first annual report is based on the business done during the period beginning on the beginning date and ending on the last accounting period ending date for federal income tax purposes that is in the same calendar year as the beginning date. The privilege period for the first annual report is from the beginning date through December 31 of the year in which the first annual report is originally due.

(ii) Annual report. The annual franchise tax report must be filed and the tax paid no later than May 15 of each year. The taxable margin computed on an annual report is based on the business done during the period beginning with the day after the last date upon which tax was computed under Tax Code, Chapter 171 on a previous report, and ending with the last accounting period ending date for federal income tax purposes ending in the calendar year before the calendar year in which the report is originally due, or, if there is no such ending date, then ending on December 31 of the calendar year before the calendar year in which the report is originally due. A taxable entity that uses a 52 - 53 week accounting year end and has an accounting year ending the first four days of January of the year in which the annual report is originally due may use the preceding December 31 as the date through which taxable margin is computed. If the period used to compute business done for purposes of the annual report differs from the taxable entity's last accounting period for federal income tax purposes, then the taxable entity's total revenue for purposes of the annual report shall be computed as if the taxable entity had reported its federal taxable income on an Internal Revenue Service form covering the period used to compute business done for purposes of the annual report. The privilege period for an annual report is January 1 through December 31 of the year in which the annual report is originally due.

(D) Extensions. See §3.1 of this title (relating to Request for Extension [~~extension~~] of Time in Which to File Report), for extensions of time to file an initial or final report. See §3.585 of this title (relating to Margin: Annual Report Extensions), for extensions of time to file an annual report, including the first annual report.

(E) Final report. See §3.592 of this title (relating to Margin: Additional Tax) for information concerning the additional tax imposed by Tax Code, §171.0011.

(F) Transition. See §3.595 of this title (relating to Margin: Transition) for transitional information concerning tax rates and privilege periods as a result of certain legislative changes.

(G) Passive entities. See §3.582 of this title [~~(relating to Margin: Passive Entities)~~], for information concerning the reporting requirements for a passive entity.

(H) Combined reporting. Taxable entities that are part of an affiliated group engaged in a unitary business must file a combined group report in lieu of individual reports, except that a public information report or ownership information report must be filed for each member of the combined group with nexus. See §3.590 of this title (relating to Margin: Combined Reporting), for rules on filing a combined report.

(2) The postmark date (or meter-mark if there is no postmark) on the envelope in which the report or payment is received determines the date of filing.

(d) Calculation of tax.

(1) Annual Election. If eligible, a taxable entity must make an annual election to deduct cost of goods sold or compensation by the due date or at the time the report is filed, whichever is later. The election is made by filing the franchise tax report using one method or the other. (See §3.588 of this title (relating to Margin: Cost of Goods Sold) and §3.589 of this title (relating to Margin: Compensation) for eligibility). If an election is not made, the taxable entity's margin will be calculated as 70% of total revenue. After the due date of the report, a taxable entity may not amend its report to change its election to cost of goods sold or compensation. However, a taxable entity may amend its report to change its method of computing margin from cost of goods sold or compensation to 70% of total revenue or, if eligible, the E-Z Computation.

(2) Calculation. A taxable entity's margin equals the least of the following three calculations, if eligible:

(A) Total revenue minus cost of goods sold;

(B) Total revenue minus compensation; or

(C) 70% of total revenue.

(3) Rate. A tax rate of 1.0% of taxable margin applies to most taxable entities. A tax rate of 0.5% of taxable margin applies to taxable entities primarily engaged in retail or wholesale trade under division F or G of the 1987 Standard Industrial Classification Manual published by the Federal Office of Management and Budget. A taxable entity is primarily engaged in retail or wholesale trade only if:

(A) the total revenue from its activities in retail and wholesale trade is greater than the total revenue from its activities in trades other than the retail and wholesale trade;

(B) less than 50% of the total revenue from activities in retail or wholesale trade comes from the sale of products it produces or products produced by an entity that is part of an affiliated group to which the taxable entity also belongs, except for those businesses under Major Group 58 (eating and drinking establishments). A product is not considered to be produced if modifications made to the acquired product do not increase its sales price by more than 10%; and

(C) the taxable entity does not provide retail or wholesale utilities, including telecommunications services, electricity or gas.

(4) Annualized Total Revenue. When the accounting period on which a report is based is more or less than 12 months, a taxable entity must annualize its total revenue to determine its eligibility for the [~~$300,000~~] no tax due threshold, discounts [~~discount~~], and E-Z Computation. The amount of total revenue used in the actual tax calculations will not change as a result of annualizing revenue. To annualize total revenue, an entity will divide total revenue by the number of days in the period upon which the report is based, and then multiply the result by 365. Examples are as follows:

(A) a taxable entity's 2010 [~~2008~~] franchise tax report is based on the period September 15, 2009 [~~2007~~] through December 31, 2009 [~~2007~~] (108 days), and its total revenue for the period is $375,000 [~~$150,000~~]. The taxable entity's annualized total revenue is $1,267,361 [~~$506,944~~] ($375,000 [~~$150,000~~] divided by 108 days multiplied by 365 days). Based on its annualized total revenue, the taxable entity does [~~would~~] not qualify for the $1,000,000 [~~$300,000~~] no tax due threshold but[~~,~~] is eligible to file using the E-Z computation. The discounts do not apply in years when the no tax due threshold is $1,000,000 [~~and would qualify for a discount of 40% of the tax due~~];

(B) a taxable entity's 2010 [~~2008~~] franchise tax report is based on the period March 1, 2008 [~~January 1, 2006~~] through December 31, 2009 [~~2007~~] (671 [~~730~~] days), and its total revenue for the period is $1,375,000 [~~$1,500,000~~]. The taxable entity's annualized total revenue is $747,951 [~~$750,000~~] ($1,375,000 [~~$1,500,000~~] divided by 671 [~~730~~] days multiplied by 365 days). Based on its annualized total revenue, the taxable entity qualifies [~~would not qualify~~] for the $1,000,000 [~~$300,000~~] no tax due threshold and[~~,~~] is eligible to file using the No Tax Due Information Report [~~E-Z computation and would qualify for a discount of 20% of the tax due~~].

(5) No tax due. [~~A taxable entity will owe no tax if its tax due is less than $1,000, it has zero Texas receipts, or its annualized total revenue is less than or equal to $300,000, or the amount determined under Tax Code, §171.006.~~] See §3.587(c)(8)(C) of this title (relating to Margin: Total Revenue) for the tiered partnership exception. [~~A taxable entity that does not owe any tax under this subsection must file a report as follows:~~]

(A) A taxable entity owes no tax and may file a No Tax Due Information Report if its annualized total revenue is: [~~a taxable entity, other than a combined group, that has zero Texas receipts or has annualized total revenue of $300,000 or less may file a No Tax Due Information Report;~~]

(i) for reports originally due on or after January 1, 2008 but before January 1, 2010, $300,000 or less;

(ii) for reports originally due on or after January 1, 2010 but before January 1, 2012, $1 million or less; and

(iii) for reports originally due on or after January 1, 2012, $600,000 or less, or the amount determined under Tax Code, §171.006.

(B) A taxable entity that has zero Texas receipts owes no tax and may file a No Tax Due Information Report. [~~a taxable entity that has tax due of less than $1,000 cannot file a No Tax Due Information Report and must file either a regular annual report or, if qualified, the E-Z Computation Report;~~]

(C) A taxable entity that has tax due of less than $1,000 owes no tax; however, the entity [~~a combined group~~] cannot file a No Tax Due Information Report and must file [~~either~~] a regular annual report or, if qualified, the E-Z Computation Report.

(6) Discount. A taxable entity is entitled to a discount of the tax imposed as follows. [~~If annualized total revenue is:~~]

(A) For reports originally due on or after January 1, 2008 but before January 1, 2010, if annualized total revenue is:

(i) [~~(A)~~] greater than $300,000 and less than $400,000, the discount is 80% of tax due;[~~.~~]

(ii) [~~(B)~~] greater than or equal to $400,000 and less than $500,000, the discount is 60% of tax due;[~~.~~]

(iii) [~~(C)~~] greater than or equal to $500,000 and less than $700,000, the discount is 40% of tax due;[~~.~~]

(iv) [~~(D)~~] greater than or equal to $700,000 and less than $900,000, the discount is 20% of tax due.

(B) For reports originally due on or after January 1, 2010 but before January 1, 2012, there are no discounts.

(C) For reports originally due on or after January 1, 2012, if annualized total revenue is:

(i) greater than $600,000 and less than $700,000, the discount is 40% of tax due;

(ii) greater than or equal to $700,000 and less than $900,000, the discount is 20% of tax due.

(7) E-Z Computation. A taxable entity with annualized total revenue of $10 million or less may choose to pay the franchise tax by using the E-Z Computation method. Under the E-Z Computation, a taxable entity's tax liability is computed by applying a tax rate of 0.575% to apportioned total revenue and subtracting any applicable discount as provided by paragraph (6) of this subsection. No deduction is allowed for cost of goods sold or compensation if a taxable entity chooses to compute its tax liability under the E-Z Computation. Additionally, no other credits or adjustments are allowed if a taxable entity chooses to compute its tax liability under the E-Z Computation.

(8) Tiered partnership provision. See §3.587(b)(14) and (c)(8) of this title for information concerning the tiered partnership provision.

(A) Eligibility for no tax due, discounts and the E-Z Computation. For eligible entities choosing to file under the tiered partnership provision, paragraphs (5), (6) and (7) of this subsection do not apply to an upper or lower tier entity if, before the attribution of total revenue by a lower tier entity to [~~an~~] upper tier entities [~~entity~~], the lower tier entity does not meet the criteria.

(B) Tiered Partnership Report. The lower tier entity must submit a report to the comptroller indicating its total revenue before attribution and [~~showing~~] the amount of total revenue that each upper tier entity must include with the upper tier entity's own total revenue. Each upper tier entity must submit a report to the comptroller indicating the lower tier entity's total revenue before attribution and [~~showing~~] the amount of the lower tier entity's total revenue that was passed to the upper tier entity and is included in the total revenue of the upper tier entity.

(e) Penalty and interest on delinquent taxes.

(1) Tax Code, §171.362, imposes a 5.0% penalty on the amount of franchise tax due by a taxable entity that fails to report or pay the tax when due. If any part of the tax is not reported or paid within 30 days after the due date, an additional 5.0% penalty is imposed on the amount of tax unpaid. There is a minimum penalty of $1.00. Delinquent taxes accrue interest beginning 60 days after the due date. For example, if payment is made on the 61st day after the due date, one day's interest is due. The annual rate of interest on delinquent taxes is the prime rate plus one percent, as published in The Wall Street Journal on the first day of each calendar year that is not a Saturday, Sunday, or legal holiday.

(2) When a taxable entity is issued an audit assessment or other underpayment notice based on a deficiency, penalties under Tax Code, §171.362, and interest are applied as of the date that the underpaid tax was originally due, including any extensions, not from the date of the deficiency determination or date the deficiency determination is final.

(3) A deficiency determination is final 30 days after the date on which the service of the notice of the determination is completed. Service by mail is complete when the notice is deposited with the United States Postal Service.

(A) The amount of a determination is due and payable 10 days after it becomes final. If the amount of the determination is not paid within 10 days after the day it became final, a penalty under Tax Code, §111.0081, of 10% of the tax assessed will be added. For example, if a deficiency determination is made in the amount of $1,000 tax (plus the initial penalty and interest), but the total amount of the deficiency is not paid until the 41st day after the deficiency notice is served, $1,200 plus interest would be due (i.e., $1,000 tax, $100 initial penalty for not paying when originally due, $100 penalty for not paying deficiency determination within 10 days after it became final, plus interest accrued to the date of payment at the applicable statutory rate).

(B) A petition for redetermination must be filed within 30 days after the date on which the service of the notice of determination is completed, or the redetermination is barred.

(C) A decision on a petition for redetermination becomes final 20 days after service on the petitioner of the notice of the decision. The amount of a determination is due and payable 20 days after the decision is final. If the amount of the determination is not paid within 20 days after the day the decision becomes final, a penalty under Tax Code, §111.0081, of 10% of the tax assessed will be added. Using the previous example, on the 41st day after service of the decision, $1,200 plus interest would be due (i.e., $1,000 tax, $100 initial penalty, $100 additional penalty and the applicable accrued interest).

(4) A jeopardy determination is final 20 days after the date on which the service of the notice is completed unless a petition for redetermination is filed before the determination becomes final. Service by mail is complete when the notice is deposited with the United States Postal Service. The amount of the determination is due and payable immediately. If the amount determined is not paid within 20 days from the date of service, a penalty, under Tax Code, §111.022, of 10% of the amount of tax and interest assessed will be added.

(5) If the comptroller determines that a taxable entity exercised reasonable diligence to comply with the statutory filing or payment requirements, the comptroller may waive penalties or interest for the late filing of a report or for a late payment. The taxable entity requesting waiver must furnish a detailed description of the circumstances that caused the late filing or late payment and the diligence exercised by the taxable entity in attempting to comply with the statutory requirements. See §3.5 of this title (relating to Waiver of Penalty or Interest) for additional information.

(6) If a taxable entity fails to comply with Tax Code, §171.212, the taxable entity is liable for a penalty of 10% of the tax that should have been reported and had not previously been reported to the comptroller under Tax Code, §171.212. This penalty is in addition to any other penalty provided by law.

(f) Amended reports. In filing an amended report, the taxable entity must type or print on the top of the report the phrase "Amended

Report." The report should be forwarded with a cover letter of explanation, with enclosures necessary to support the amendment. Applicable penalties and interest must be reported and paid along with any additional amount of tax shown to be due on the amended report.

(1) A taxable entity may file an amended report for the purpose of correcting a mathematical or other error in a report, for the purpose of supporting a claim for refund, or to change its method of computing margin to 70% of total revenue or, if qualified, the E-Z Computation. After the due date of the report, an amended report may not be filed to change the method of computing margin to a cost of goods sold deduction or to a compensation deduction.

(2) A taxable entity that has been audited by the Internal Revenue Service must file an amended franchise tax report within 120 days after the Revenue Agent's Report (RAR) is final, if the RAR results in changes to taxable margin reported for franchise tax purposes. An RAR is final when all administrative appeals with the Internal Revenue Service have been exhausted or waived. An administrative appeal with the Internal Revenue Service does not include an action or proceeding in the United States Tax Court or any other federal court.

(3) A taxable entity whose taxable margin is changed as a result of an audit or other adjustment by a competent authority other than the Internal Revenue Service must file an amended franchise tax report within 120 days after the adjustment is final. An adjustment is final when all administrative or other appeals have been exhausted or waived. For the purposes of this section, a competent authority includes, but is not limited to, the United States Tax Court, United States District Courts, United States Courts of Appeals, and United States Supreme Court.

(4) A taxable entity must file an amended franchise tax report within 120 days after the taxable entity files an amended federal income tax return that changes the taxable entity's taxable margin. A taxable entity is considered to have filed an amended federal income tax return if the taxable entity is a member of an affiliated group during a period in which an amended consolidated federal income tax return is filed.

(5) A final determination resulting from an Internal Revenue Service administrative proceeding (including an audit), or a judicial proceeding arising from an administrative proceeding, that affects the amount of franchise tax liability must be reported to the comptroller before the expiration of 120 days after the day on which the determination becomes final. See Tax Code, §111.206.

(6) Because the 10% penalty provided for in Tax Code, §171.212 only applies to deficiencies, failure to file an amended return in which a refund would result will not cause a 10% penalty to be imposed.

(g) Comptroller audit. During the course of an audit or other examination of a taxable entity's franchise tax account, the comptroller may examine financial statements, working papers, registers, memoranda, contracts, corporate minutes, and any other business papers used in connection with its accounting system. In connection with the examination, the comptroller may also examine any of the taxable entity's officers or employees under oath.

(h) Payment of determination. The payment of a determination issued to a taxable entity for an estimated tax liability shall not satisfy the reporting requirements set forth in Tax Code, Chapter 171, Subchapter E, concerning reports and records.

(i) Information report. Each taxable entity on which the franchise tax is imposed must file an information report.

(1) For a taxable entity legally formed as a corporation, limited liability company, or financial institution, a public information report as described in Tax Code, §171.203, is due at the same time each initial and annual, including the first annual, report is due. An authorized person must sign the public information report on behalf of the taxable entity under a certification that:

(A) all information contained in the report is true and correct to the best of the authorized person's knowledge; and

(B) a copy of the report has been mailed to each person named in the report who is an officer, director, or manager and who is not employed by the taxable entity or a related (at least 10% ownership) taxable entity on the date the report is filed.

(C) A report that is filed electronically complies with the signature and certification requirements of this provision.

(2) For all other taxable entities, an ownership information report as described in Tax Code, §171.201 and §171.202 is due at the same time each initial and annual, including the first annual, report is due.

(3) Failure to file or sign a public information report or ownership information report shall result in the forfeiture of corporate or business privileges as provided by Tax Code, §171.251 and §171.2515. If the corporate or business privileges are forfeited, each officer or director of the taxable entity may be liable for each debt of the taxable entity that is created or incurred in Texas after the date on which the report is due and before the corporate or business privileges are revived, as provided by Tax Code, §171.255.

(4) The provisions of paragraph (3) of this subsection, concerning forfeiture of corporate privileges do not apply to a banking taxable entity or a savings and loan association, as defined in Tax Code, §171.001.

(5) For purposes of this subsection:

(A) authorized person means, in the case of a corporation, an officer, director or other authorized person of the corporation;

(B) authorized person means, in the case of a limited liability company, a member, manager or other authorized person of the limited liability company;

(C) authorized person means, in the case of a limited partnership, a partner or other authorized person of the partnership;

(D) director includes a manager of a limited liability company, a general partner in a limited partnership and a general partner in a partnership registered as a limited liability partnership;

(E) authorized person also includes a paid preparer authorized to sign the report.

(6) Taxable entities that are members of a combined group and do not have nexus in Texas are not required to file an ownership information report or a public information report.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 16, 2009.

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Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 475-0387

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34 TAC §3.587

The Comptroller of Public Accounts (comptroller) proposes an amendment to §3.587, concerning margin: total revenue.

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

Language is deleted from subsection (b)(1)(C) to allow uncompensated care charges to include charges for services covered by the programs described in subsection (e)(10)(A)(i) - (iii) of this section, services performed for a contracted rate from a private health care plan or services performed for an agreed upon rate from an individual, but only if the partial payments received do not cover the cost of the care provided. New language is added to clarify that uncompensated care charges do not include any portion of a charge that the health care provider has no right to collect under a private health care plan, under an agreement with an individual for a specific amount or under the charge limitations imposed by the programs described in subsection (e)(10)(A)(i) - (iii).

Language is added to subsection (b)(6), the definition of a management company, to more accurately reflect our current policy.

Subsection (c)(5) is amended by adding subparagraphs (A) and (B) to clarify that net distributive income that is subtracted from total revenue may not be included in the determination of compensation. Subsection (c)(8)(C) is amended to clarify that neither the upper tier entity nor the lower tier entity filing under the tiered partnership provision qualifies for no tax due, discounts and the E-Z Computation if, before the attribution of any total revenue by a lower tier entity to upper tier entities, the lower tier does not meet the criteria. Subsection (c)(8)(G) is added to prohibit, for reports originally due on or after January 1, 2010, the election of the tiered partnership provision if, before the attribution of total revenue, the lower tier entity owes no tax.

Subsection (d)(2)(A)(iv) is amended to include the amounts reportable on Line 19 of Internal Revenue Service Form 8825 (the net gain/loss from the disposition of property from rental real estate activities) in the calculation of total revenue for an S corporation, to accurately reflect our current policy.

Subsection (e)(14) is added to implement Senate Bill 636 that allows an exclusion from total revenue for payments made by a qualified destination management company in connection with the provision of destination management services, effective for reports originally due on or after January 1, 2010.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by clarifying the treatment of various amounts in the calculation of total revenue, by better reflecting current policy, and by implementing provisions from the 81st Legislature, 2009. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposals may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.1011 and §171.1015.

§3.587. Margin: Total Revenue.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008, except as otherwise noted.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Actual cost of uncompensated care--the amount determined by multiplying Operating Expenses by the Uncompensated Care Ratio where:

(A) operating expenses are the amounts reported on line 2 and line 21, Internal Revenue Service Form 1065 or the amounts reported on line 2 and line 20, Internal Revenue Service Form 1120S or the corresponding line items from any other federal form filed, less any items that have already been subtracted from total revenue (e.g., bad debts);

(B) uncompensated care ratio means uncompensated care charges less partial payments divided by total charges;

(C) uncompensated care charges are the standard charges for health care services where the provider has not received any payment or where the provider has received partial payment that does not cover the cost of the [~~for~~] health care provided to the patient. Uncompensated care charges do not include any portion of a charge that the health care provider has no right to collect under a private health care plan, under an agreement with an individual for a specific amount or under the charge limitations imposed [~~charges for any services covered~~] by the programs described in subsection (e)(10)(A)(i) - (iii) of this section[~~, services performed for a contracted rate from a private health care plan, services performed for an agreed upon rate from an individual, or services performed where payments received cover the cost of the care provided~~];

(D) standard charges must be comparable to the charges applied to services provided to all patients of the health care provider;

(E) partial payment is an amount that has been received toward uncompensated care charges that does not cover the cost of the services provided;

(F) total charges are charges for all health care services, including uncompensated care;

(G) records that clearly identify each patient, the procedure performed, and the standard charge for such a service, as well as payments received from each patient must be maintained by the health care provider for all uncompensated care;

(H) a corresponding adjustment must be made to reduce the cost of goods sold deduction or the compensation deduction for the portion of the cost of goods sold or compensation that has been excluded from revenue:

(i) the cost of goods sold deduction is reduced by subtracting the product of the cost of goods sold under §3.588 of this title (relating to Margin: Cost of Goods Sold) multiplied by the uncompensated care ratio;

(ii) the compensation deduction is reduced by subtracting the product of the compensation and benefits amounts under §3.589 of this title (relating to Margin: Compensation) multiplied by the uncompensated care ratio.

(2) Federal obligations--

(A) stocks and other direct obligations of, and obligations unconditionally guaranteed by, the United States government and United States government agencies; and

(B) direct obligations of a United States government-sponsored agency.

(3) Health care institution--Means an ambulatory surgical center; an assisted living facility licensed under Health and Safety Code, Chapter 247; an emergency medical services provider; a home and community support services agency; a hospice; a hospital; a hospital system; an intermediate care facility for the mentally retarded or a home and community-based services waiver program for persons with mental retardation adopted in accordance with the federal Social Security Act, §1915(c) (42 U.S.C. §1396n); a birthing center; a nursing home; an end stage renal disease facility licensed under Health and Safety Code, §251.011; or a pharmacy.

(4) Health care provider--Any taxable entity that participates in the Medicaid program, Medicare program, Children's Health Insurance Program (CHIP), state workers' compensation program, or TRICARE military health system as a provider of health care services.

(5) Lending institution--An entity that makes loans and;

(A) is regulated by the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Commodity Futures Trading Commission, the Office of Thrift Supervision, the Texas Department of Banking, the Office of Consumer Credit Commissioner, the Credit Union Department, or any comparable regulatory body;

(B) is licensed by, registered with, or otherwise regulated by the Department of Savings and Mortgage Lending;

(C) is a "broker" or "dealer" as defined by the Securities Exchange Act of 1934 at 15 U.S.C. §78c; or

(D) provides financing to unrelated parties solely for agricultural production.

(6) Management company--A corporation, limited liability company, or other limited liability entity that conducts all or part of the active trade or business of another entity ("the managed entity") in exchange for a management fee and reimbursement of specified costs incurred in the conduct of the active trade or business of the managed entity, including wages and cash compensation as determined under Tax Code, §171.1013(a) and (b). To qualify as a management company:

(A) the entity must perform active and substantial management and operational functions, control and direct the daily operations and provide services such as accounting, general administration, legal, financial or similar services; or [~~a management fee; and~~]

(B) if the entity does not conduct all of the active trade or business of an entity, the entity must conduct all operations, as provided in subparagraph (A) of this paragraph, for a distinct revenue-producing component of the entity [~~reimbursement of specified costs incurred in the conduct of the active trade or business of the managed entity, including wages and cash compensation as determined under Tax Code, §171.1013(a) and (b)~~].

(7) Net distributive income--The net amount of income, gain, deduction, or loss relating to a pass-through entity or disregarded entity reportable to the owners for the tax year of the entity.

(8) Obligation--Any bond, debenture, security, mortgage-backed security, pass-through certificate, or other evidence of indebtedness of the issuing entity. The term does not include a deposit, a repurchase agreement, a loan, a lease, a participation in a loan or pool of loans, a loan collateralized by an obligation of a United States government agency, or a loan guaranteed by a United States government agency.

(9) Pro bono services--The direct provision of legal services to the poor, without an expectation of compensation.

(10) Product--Services, tangible personal property, and intangible property.

(11) Sales commission--

(A) any form of compensation paid to a person for engaging in an act for which a license is required by Occupations Code, Chapter 1101; or

(B) compensation paid to a sales representative by a principal in an amount that is based on the amount or level of certain orders for or sales of the principal's product and that the principal is required to report on Internal Revenue Service Form 1099-MISC (or would have been reported if the amount had met the Internal Revenue Service minimum reporting requirement).

(C) for purposes of defining sales commission, a principal is a person who:

(i) manufactures, produces, imports, distributes, or acts as an independent agent for the distribution of a product for sale;

(ii) uses a sales representative to solicit orders for the product; and

(iii) compensates the sales representative wholly or partly by sales commission.

(12) Security--The meaning assigned by Internal Revenue Code, §475(c)(2), and includes instruments described by Internal Revenue Code, §475(e)(2)(B), (C), and (D).

(13) Staff leasing services company--A business entity that offers staff leasing services, as that term is defined by Labor Code, §91.001, or a temporary employment service, as that term is defined by Labor Code, §93.001.

(14) Tiered partnership arrangement--An ownership structure in which any of the interests in one taxable entity treated as a partnership or an S corporation for federal income tax purposes (a "lower tier entity") are owned by one or more other taxable entities (an "upper tier entity").

(15) United States government--Any department or ministry of the federal government, including a federal reserve bank. The term does not include a state or local government, a commercial enterprise owned wholly or partly by the United States government, or a local governmental entity or commercial enterprise whose obligations are guaranteed by the United States government.

(16) United States government agency--An instrumentality of the United States government whose obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the United States government. The term includes the Government National Mortgage Association, the Department of Veterans Affairs, the Federal Housing Administration, the Farmers Home Administration, the Export-Import Bank, the Overseas Private Investment Corporation, the Commodity Credit Corporation, the Small Business Administration, and any successor agency.

(17) United States government-sponsored agency--An agency originally established or chartered by the United States government to serve public purposes specified by the United States Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the United States government. The term includes the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, the Farm Credit System, the Federal Home Loan Bank System, the Student Loan Marketing Association, and any successor agency.

(c) General rules for reporting total revenue.

(1) Variant of form. Any reference to an Internal Revenue Service form includes a variant of the form. For example, a reference to Form 1120 includes Forms 1120-A, 1120-S, and other variants of Form 1120. A reference to an Internal Revenue Service form also includes any subsequent form with a different number or designation that substantially provides the same information as the original form.

(2) Amount reportable. Any reference to an amount reportable as income on a line number on an Internal Revenue Service form is the amount entered to the extent the amount entered complies with federal income tax law and includes the corresponding amount entered on a variant of the form, or a subsequent form, with a different line number to the extent the amount entered complies with federal income tax law.

(3) Federal consolidated group. A taxable entity that is part of a federal consolidated group or is a disregarded entity shall compute its total revenue as if it had filed a separate return for federal income tax purposes; provided, however, that a disregarded entity may combine its revenue, cost of goods sold, compensation and gross revenue with its parent as provided by §3.590(d)(6) of this title (relating to Margin: Combined Reporting). Further information on combined entities can be found in §3.590 of this title.

(4) Passive entity. A taxable entity will include its share of net distributive income from a passive entity, but only to the extent the net income of the passive entity was not generated by any other taxable entity.

(5) Exclusions from total revenue.

(A) Any expense excluded from total revenue (e.g. flow-through funds or the cost of uncompensated care allowed under subsection (e) of this section) may not be included in the determination of cost of goods sold (see §3.588 of this title) or the determination of compensation (see §3.589 of this title).

(B) Net distributive income that is subtracted from total revenue may not be included in the determination of compensation.

(6) Contract services. Except as provided by subsection (e)(2) of this section, a payment received under an ordinary contract for the provision of services in the ordinary course of business may not be excluded from the calculation of total revenue.

(7) Payment to affiliated group members. If the taxable entity belongs to an affiliated group, the taxable entity may not exclude from the calculation of total revenue any payments described by subsection (e)(1) - (6) of this section that are made to entities that are members of the affiliated group.

(8) Tiered partnership provision. This provision is not mandatory. Subject to the following subparagraphs, a lower tier entity in a tiered partnership arrangement may exclude from total revenue the amount of total revenue reported to an upper tier entity. If a lower tier entity chooses to file under the tiered partnership provision, the lower tier entity may report total revenue to any or all of its upper tier entities. The total revenue reported to an upper tier entity must equal the upper tier entity's ownership percentage of the lower tier entity's entire total revenue.

(A) Reporting requirements. The lower tier entity must submit a report to the comptroller showing the amount of total revenue that each upper tier entity must include with the upper tier entity's own total revenue. Each upper tier entity must submit a report to the comptroller showing the amount of the lower tier entity's total revenue that was passed to the upper tier entity and is included in the total revenue of the upper tier entity.

(B) Nontaxable upper tier entity. This paragraph does not apply to that percentage of the total revenue attributable to an upper tier entity by a lower tier entity if the upper tier entity is not subject to the tax under this chapter. In this case, the lower tier entity cannot report total revenue to the nontaxable upper tier entity and the lower tier entity cannot exclude this total revenue from its franchise tax report.

(C) Eligibility for no tax due, discounts and the E-Z Computation. The no tax due thresholds, discounts and the E-Z Computation do not apply to an upper or lower tier entity if, before the attribution of any total revenue by a lower tier entity to [~~an~~] upper tier entities [~~entity~~] under this section, the lower tier entity does not meet the criteria. See §3.584(d)(8) of this title (relating to Margin: Reports and Payments).

(D) Not a partnership distribution. Total revenue reported from a lower tier entity to an upper tier entity under the provisions of Tax Code, §171.1015(b) is not a distribution from a partnership.

(E) Combined reporting. The tiered partnership provision is not an alternative to combined reporting. Combined reporting is mandatory for taxable entities that meet the ownership and unitary criteria. See §3.590 of this title. Therefore, the tiered partnership provision is not allowed if the lower tier entity is included in a combined group.

(F) Accounting period. If the lower tier entity and an upper tier entity have different accounting periods, the upper tier entity must allocate the revenue reported from the lower tier entity to the accounting period that the upper tier entity's report is based on.

(G) Lower tier entity no tax due. For reports originally due on or after January 1, 2010, if the lower tier entity owes no tax before the attribution of total revenue to the upper tier entities, filing under the tiered partnership provision is not allowed.

(9) Allocated revenue. Revenue that Texas cannot tax because the activities generating that item of revenue do not have sufficient unitary connection with the entity's other activities conducted in Texas under the United States Constitution is not included in total revenue.

(d) Reporting total revenue. The line items in this subsection refer to line items on the 2006 Internal Revenue Service forms. In computing total revenue for a subsequent report year, total revenue should be based on the equivalent line numbers from the corresponding fed-

eral report and computed based on the Internal Revenue Code of 1986 in effect for the federal tax year beginning on January 1, 2007.

(1) Corporations. For the purpose of computing its taxable margin, the total revenue of a taxable entity treated as a corporation for federal income tax purposes is computed by:

(A) adding:

(i) the amount reportable as income on line 1c, Internal Revenue Service Form 1120;

(ii) the amounts reportable as income on lines 4 through 10, Internal Revenue Service Form 1120; and

(iii) any total revenue reported by a lower tier entity as includable in the taxable entity's total revenue under Tax Code, §171.1015(b); and

(B) subtracting, to the extent included in the calculation under subparagraph (A) of this paragraph:

(i) bad debt expensed for federal income tax purposes that corresponds to items of gross receipts included for the current reporting period or a past reporting period;

(ii) foreign royalties and foreign dividends, including amounts determined under Internal Revenue Code, §78 or §§951 - 964;

(iii) net distributive income from a taxable entity treated as a partnership or as an S corporation for federal income tax purposes, except as provided by subsection (c)(4) of this section;

(iv) allowable deductions from Internal Revenue Service Form 1120, Schedule C, to the extent the relating dividend income is included in total revenue;

(v) items of income attributable to an entity that is a disregarded entity for federal income tax purposes; and

(vi) other amounts authorized by subsection (e) of this section.

(2) S corporations. For the purpose of computing its taxable margin, the total revenue of a taxable entity treated as an S corporation for federal income tax purposes is computed by:

(A) adding:

(i) the amount reportable as income on line 1c, Internal Revenue Service Form 1120S;

(ii) the amounts reportable as income on lines 4 and 5, Internal Revenue Service Form 1120S; and

(iii) the amounts reportable as income on lines 3a and 4 through 10, Internal Revenue Service Form 1120S, Schedule K;

(iv) the amounts reportable as income on lines 17 and 19 [~~line 17~~], Internal Revenue Service Form 8825;

(v) any total revenue reported by a lower tier entity as includable in the taxable entity's total revenue under Tax Code, §171.1015(b); and

(B) subtracting, to the extent included in the calculation under subparagraph (A) of this paragraph:

(i) bad debt expensed for federal income tax purposes that corresponds to items of gross receipts included for the current reporting period or a past reporting period;

(ii) foreign royalties and foreign dividends, including amounts determined under Internal Revenue Code, §78 or §§951 - 964;

(iii) net distributive income from a taxable entity treated as a partnership or as an S corporation for federal income tax purposes, except as provided by subsection (c)(4) of this section;

(iv) items of income attributable to an entity that is a disregarded entity for federal income tax purposes; and

(v) other amounts authorized by subsection (e) of this section.

(3) Partnerships. For the purpose of computing its taxable margin, the total revenue of a taxable entity treated as a partnership for federal income tax purposes is computed by:

(A) adding:

(i) the amount reportable as income on line 1c, Internal Revenue Service Form 1065;

(ii) the amounts reportable as income on lines 4, 6, and 7, Internal Revenue Service Form 1065;

(iii) the amounts reportable as income on lines 3a and 5 through 11, Internal Revenue Service Form 1065, Schedule K;

(iv) the amounts reportable as income on line 17, Internal Revenue Service Form 8825;

(v) the amounts reportable as income on line 11, plus line 2 or line 45, Internal Revenue Service Form 1040, Schedule F; and

(vi) any total revenue reported by a lower tier entity as includable in the taxable entity's total revenue under Tax Code, §171.1015(b); and

(B) subtracting, to the extent included in the calculation under subparagraph (A) of this paragraph:

(i) bad debt expensed for federal income tax purposes that corresponds to items of gross receipts included for the current reporting period or a past reporting period;

(ii) foreign royalties and foreign dividends, including amounts determined under Internal Revenue Code, §78 or §§951 - 964;

(iii) net distributive income from a taxable entity treated as a partnership or as an S corporation for federal income tax purposes, except as provided by subsection (c)(4) of this section;

(iv) items of income attributable to an entity that is a disregarded entity for federal income tax purposes; and

(v) other amounts authorized by subsection (e) of this section.

(4) Trusts. For the purpose of computing its taxable margin, the total revenue of a taxable entity treated as a trust for federal income tax purposes is computed by:

(A) adding:

(i) the amount reportable as income on lines 1, 2a, 3, 4, 7, and 8 of Internal Revenue Service Form 1041;

(ii) the amount reportable as income on lines 3, 4, 32, and 37 of Internal Revenue Service Form 1040, Schedule E; and

(iii) the amounts reportable as income on line 11, plus line 2 or line 45, Internal Revenue Service Form 1040, Schedule F; and

(iv) any total revenue reported by a lower tier entity as includable in the taxable entity's total revenue under Tax Code, §171.1015(b); and

(B) subtracting, to the extent included in the calculation under subparagraph (A) of this paragraph:

(i) bad debt expensed for federal income tax purposes that corresponds to items of gross receipts included for the current reporting period or a past reporting period;

(ii) foreign royalties and foreign dividends, including amounts determined under Internal Revenue Code, §78 or §§951 - 964;

(iii) net distributive income from a taxable entity treated as a partnership or as an S corporation for federal income tax purposes, except as provided by subsection (c)(4) of this section;

(iv) items of income attributable to an entity that is a disregarded entity for federal income tax purposes; and

(v) other amounts authorized by subsection (e) of this section.

(5) Single member limited liability company (LLC) filing as a sole proprietorship. For the purpose of computing its taxable margin, the total revenue of a taxable entity registered as a single member limited liability company and filing as a sole proprietorship for federal income tax purposes is computed by:

(A) adding:

(i) the amount reportable as income on line 3 of Internal Revenue Service, Form 1040, Schedule C;

(ii) the amount reportable as income on line 17, Internal Revenue Service Form 4797, to the extent that it relates to the LLC;

(iii) ordinary income or loss from partnerships, S corporations, estates and trusts, Internal Revenue Service Form 1040, Schedule E, to the extent that it relates to the LLC;

(iv) the amount reportable as income on line 16 of Internal Revenue Service Form 1040, Schedule D, to the extent that it relates to the LLC;

(v) the amounts reportable as income on lines 3 and 4, Internal Revenue Service Form 1040, Schedule E, to the extent that it relates to the LLC;

(vi) the amounts reportable as income on line 11, plus line 2 or line 45, Internal Revenue Service Form 1040, Schedule F, to the extent that it relates to the LLC;

(vii) the amount reportable as income on line 6 of Internal Revenue Service Form 1040, Schedule C, that has not already been included in this subparagraph; and

(viii) any total revenue reported by a lower tier entity as includable in the taxable entity's total revenue under Tax Code, §171.1015(b); and

(B) subtracting, to the extent included in the calculation under subparagraph (A) of this paragraph:

(i) bad debt expensed for federal income tax purposes that corresponds to items of gross receipts included for the current reporting period or a past reporting period;

(ii) foreign royalties and foreign dividends, including amounts determined under Internal Revenue Code, §78 or §§951 - 964;

(iii) net distributive income from a taxable entity treated as a partnership or as an S corporation for federal income tax purposes, except as provided by subsection (c)(4) of this section;

(iv) items of income attributable to an entity that is a disregarded entity for federal income tax purposes; and

(v) other amounts authorized by subsection (e) of this section.

(6) Other taxable entities. For a taxable entity other than a taxable entity treated for federal income tax purposes as a corporation, S corporation, partnership, trust, or single member limited liability company filing as a sole proprietorship, the total revenue will be an amount determined in a manner substantially equivalent to the amount calculated for the entities listed in this subsection.

(e) Exclusions from total revenue. Except as otherwise provided in this section and only to the extent included in the calculation of total revenue under subsection (d)(1) - (6) of this section, the following items shall be excluded from total revenue:

(1) Flow-through funds mandated by law. Flow-through funds that are mandated by law or fiduciary duty to be distributed to other entities or persons, including taxes collected from a third party by the taxable entity and remitted by the taxable entity to a taxing authority;

(2) Flow-through funds mandated by contract. Flow-through funds that are mandated by contract to be distributed to other entities or persons, limited to:

(A) sales commissions, as that term is defined by subsection (b)(11) of this section, to non-employees, including split-fee real estate commissions;

(B) the tax basis as determined under the Internal Revenue Code of securities underwritten; and

(C) subcontracting payments handled by the taxable entity to provide services, labor, or materials in connection with the actual or proposed design, construction, remodeling, or repair of improvements on real property or the location of the boundaries of real property;

(3) Principal repayments. A taxable entity that is a lending institution shall exclude the principal repayment of loans;

(4) Tax basis of securities and loans. A taxable entity shall exclude the tax basis, as determined under the Internal Revenue Code, of securities and loans sold;

(5) Legal services. A taxable entity that provides legal services shall exclude:

(A) the following flow-through funds that are mandated by law, contract, or fiduciary duty to be distributed to the claimant by the claimant's attorney or to other entities on behalf of a claimant by the claimant's attorney:

(i) damages due the claimant;

(ii) funds subject to a lien or other contractual obligation arising out of the representation, other than fees owed to the attorney;

(iii) funds subject to a subrogation interest or other third-party contractual claim; and

(iv) fees paid an attorney in the matter who is not a member, partner, shareholder, or employee of the taxable entity;

(B) reimbursement of the taxable entity's expenses incurred in prosecuting a claimant's matter that are specific to the matter and that are not general operating expenses; and

(C) regardless of whether it was included in the calculation of total revenue under subsection (d) of this section, $500 per pro bono services case handled by the attorney, but only if the attorney maintains records of the pro bono services for auditing purposes in accordance with the manner in which those services are reported to the State Bar of Texas;

(6) Pharmacy cooperative. A taxable entity that is a pharmacy cooperative shall exclude flow-through funds from rebates from pharmacy wholesalers that are distributed to the pharmacy cooperative's shareholders;

(7) Staff leasing services company. A taxable entity that is a staff leasing services company shall exclude payments received from a client company for wages, payroll taxes on those wages, employee benefits, and workers' compensation benefits for the employees assigned to the client company. A staff leasing services company cannot exclude payments received from a client company for payments made to independent contractors assigned to the client company and reportable on Internal Revenue Service Form 1099;

(8) Dividends and interest from federal obligations. A taxable entity shall exclude dividends and interest received from federal obligations;

(9) Management company. A taxable entity that is a management company shall exclude reimbursements of specified costs incurred in its conduct of the active trade or business of a managed entity, including wages and cash compensation as determined under Tax Code, §171.1013(a) and (b);

(10) Health care provider. A taxable entity that is a health care provider shall exclude:

(A) the total amount of payments, including co-payments and deductibles from the patient or supplemental insurance, received:

(i) under the Medicaid program, Medicare program, Indigent Health Care and Treatment Act (Health and Safety Code, Chapter 61), and Children's Health Insurance Program (CHIP), including any plans under these programs;

(ii) for professional services provided in relation to a workers' compensation claim under Labor Code, Title 5;

(iii) for professional services provided to a beneficiary rendered under the TRICARE military health system, including any plans under this program;

(iv) from a third-party agent or administrator for revenue earned under clauses (i) - (iii) of this subparagraph; and

(B) the actual costs, regardless of whether it was included in the calculation of total revenue under subsection (d)(1) - (6) of this section, of uncompensated care provided, but only if the provider maintains records of the uncompensated care for auditing purposes and, if the provider later receives payment for all or part of that care, the provider adjusts the amount excluded for the tax year in which the payment is received.

(11) Health care institution. A health care provider that is a health care institution shall exclude 50% of the exclusion described in paragraph (10) of this subsection.

(12) Federal government and armed forces. A taxable entity shall exclude all revenue received that is directly derived from the operation of a facility that is:

(A) located on property owned or leased by the federal government; and

(B) managed or operated primarily to house members of the armed forces of the United States.

(13) Oil and gas. During the dates, certified by the comptroller, in which the monthly average closing price of West Texas Intermediate crude oil is below $40 per barrel and the average closing price of gas is below $5 per MMBtu, as recorded on the New York Mercantile Exchange (NYMEX), a taxable entity shall exclude total revenue received from oil or gas produced from:

(A) an oil well designated by the Railroad Commission of Texas or similar authority of another state whose production averages less than 10 barrels a day over a 90-day period; and

(B) a gas well designated by the Railroad Commission of Texas or similar authority of another state whose production averages less than 250 mcf a day over a 90-day period.

(14) Qualified destination management company. Effective for reports originally due on or after January 1, 2010, a taxable entity that is a qualified destination management company as defined by Tax Code, §151.0565 shall exclude from its total revenue payments made to other entities or persons to provide services, labor, or materials in connection with the provision of destination management services as defined in Tax Code, §151.0565.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 16, 2009.

TRD-200904651
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 475-0387

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34 TAC §3.589

The Comptroller of Public Accounts proposes an amendment to §3.589, concerning margin: compensation.

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

Language is added to subsection (b)(3), the definition of a management company, to more accurately reflect our current policy.

Subsections (b)(9)(B) and (d)(2) are amended to clarify that net distributive income that is subtracted from total revenue may not be included in the determination of compensation.

Subsection (c)(1) is amended to implement Tax Code, §171.006, that requires an adjustment, in even-numbered years, to the maximum per-person wage and cash compensation deduction based on the consumer price index. The maximum per-person deduction is increased from $300,000 to $320,000, effective for reports due on or after January 1, 2010.

Subsection (d)(1) is amended to clarify that any payments made, not just payments made to independent contractors, that are reportable on an Internal Revenue Service Form 1099 may not be included in the determination of compensation.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by clarifying the treatment of various amounts in the calculation of compensation, by better reflecting current policy, and by implementing an existing provision of Tax Code, Chapter 171. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§171.006, 171.101, 171.1011(j) and 171.1013.

§3.589. Margin: Compensation.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008, except as otherwise noted.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Assigned employee--Has the meaning assigned by Labor Code, §91.001.

(2) Client company--

(A) a person that contracts with a license holder under Labor Code, Chapter 91, and is assigned employees by the license holder under that contract; or

(B) a client of a temporary employment service, as that term is defined by Labor Code, §93.001(2), to whom individuals are assigned for a purpose described by that subdivision.

(3) Management company--A corporation, limited liability company or other limited liability entity that conducts all or part of the active trade or business of another entity (the managed entity) in exchange for a management fee and reimbursement of specified costs incurred in the conduct of the active trade or business of the managed entity, including wages and cash compensation as determined under Tax Code, §171.1013(a) and (b). To qualify as a management company:

(A) the entity must perform active and substantial management and operational functions, control and direct the daily operations and provide services such as accounting, general administration, legal, financial or similar services; or [~~a management fee; and~~]

(B) if the entity does not conduct all of the active trade or business of an entity, the entity must conduct all operations, as provided in subparagraph (A) of this paragraph, for a distinct revenue-producing component of the [~~reimbursement of specified costs incurred in the conduct of the active trade or business of the managed~~] entity.

(4) Natural person--A human being or the estate of a human being. The term does not include a purely legal entity given recognition as the possessor of rights, privileges, or responsibilities, such as a corporation, limited liability company, partnership, or trust.

(5) Net distributive income--The net amount of income, gain, deduction, or loss relating to a pass-through entity or disregarded entity reportable to the owners for the tax year of the entity.

(6) Small employer--An entity defined in Insurance Code, §1501.002.

(7) Staff leasing services company--A business entity that offers staff leasing services as that term is defined by Labor Code, §91.001, or temporary employment service as that term is defined by Labor Code, §93.001.

(8) Undocumented worker--A person who is not lawfully entitled to be present and employed in the United States.

(9) Wages and cash compensation--

(A) the amount entered in the Medicare wages and tips box of Internal Revenue Service Form W-2 or any subsequent form with a different number or designation that substantially provides the same information for the period on which the tax is based;

(B) the amount of net distributive income (not to include net distributive income that has been subtracted from total revenue), regardless of whether cash or property pertaining to such income is actually distributed and regardless of whether it is a positive or negative amount, from one of the following entities to partners or owners during the accounting period but only if the person receiving the amount is a natural person:

(i) taxable entities treated as partnerships for federal income tax purposes;

(ii) limited liability companies and corporations treated as S corporations for federal income tax purposes; and

(iii) limited liability companies treated as sole proprietorships for federal income tax purposes;

(C) stock awards and stock options deducted for federal income tax purposes, to the extent not included in subparagraph (A) of this paragraph.

(c) Compensation. Subject to Tax Code, §171.1014, a taxable entity that elects to subtract compensation (see subsection (i) in this section) for the purpose of computing its taxable margin under Tax Code, §171.101, may subtract an amount equal to:

(1) subject to subsection (d) of this section, all wages and cash compensation paid by a taxable entity to its officers, directors, owners, partners and employees. [~~The taxable entity cannot subtract more than $300,000 per 12-month period on which the tax is based, or the amount determined under Tax Code, §171.006, for any one person in wages and cash compensation it determines under Tax Code, §171.101. See §3.590 of this title (relating to Margin: Combined Reporting); and~~]

(A) For reports originally due on or after January 1, 2008 but before January 1, 2010, the taxable entity cannot subtract more than $300,000 per 12-month period on which the tax is based for any one person in wages and cash compensation it determines under Tax Code, §171.1013. See §3.590 of this title (relating to Margin: Combined Reporting).

(B) For reports originally due on or after January 1, 2010, the taxable entity cannot subtract more than $320,000 (determined under Tax Code, §171.006) per 12-month period on which the tax is based for any one person in wages and cash compensation it determines under Tax Code, §171.1013. See §3.590 of this title; and

(2) subject to subsection (e) of this section, the cost of all benefits the taxable entity provides to its officers, directors, owners, partners, and employees;

(d) Compensation - excluded items. Compensation does not include:

(1) payments made that are [~~to independent contractors and~~] reportable on Internal Revenue Form 1099 (or would have been reported if the amount had met the Internal Revenue Service minimum reporting requirement);

(2) any [~~exclusions from total revenue. See §3.587 of this title (relating to Margin: Total Revenue). Any~~] expense excluded from total revenue and any net distributive income subtracted from total revenue. See §3.587 of this title (relating to Margin: Total Revenue) [~~may not be included in the determination of compensation~~];

(3) an employer's share of payroll taxes;

(4) wages or cash compensation paid to an employee whose primary employment is directly associated with the operation of a facility that is located on property owned or leased by the federal government, and managed or operated primarily to house members of the armed forces of the United States. See §3.587 of this title; and

(5) wages or cash compensation paid to undocumented workers.

(e) Benefits. A taxable entity is allowed to subtract the cost of all benefits to the extent deductible for federal income tax purposes that it provides to its officers, directors, owners, partners, and employees.

(1) The term "benefits" includes employer contributions made to:

(A) employees' health savings accounts;

(B) health care (for example, this would include contributions to the cost of health insurance);

(C) retirement; and

(D) workers' compensation.

(2) The term "benefits" does not include the following:

(A) amounts included in the definition of wages and cash compensation;

(B) discounts on the price of the taxable entity's merchandise or services sold to the taxpayer's employees, officers, or directors, partners, or owners that are not available to other customers;

(C) payroll taxes. (For example, "payroll taxes" would include payments to state and federal unemployment compensation funds and payments under the Federal Insurance Contributions Act, Chapter 21 of Subtitle C of the Internal Revenue Code, §§3101 - 3128, the Railroad Retirement Tax Act, Chapter 22 of Subtitle C of the Internal Revenue Code, §§3201 - 3233); and

(D) working condition amounts provided so employees can perform their jobs. (Examples of working condition benefits include an employee's use of a company car for business, job-related education provided to an employee, and travel reimbursement.)

(3) The cost of benefits does not include the amount paid by an employee.

(f) Staff leasing companies. See §3.587 of this title.

(1) A staff leasing company cannot include as compensation the following payments for assigned employees:

(A) wages and cash compensation;

(B) payroll taxes;

(C) employee benefits including workers' compensation; and

(D) payments made to independent contractors and reportable on Internal Revenue Service Form 1099 (or would have been reported if the amount had met the Internal Revenue Service minimum reporting requirement).

(2) A client company can include as compensation the following amounts for assigned employees:

(A) wages and cash compensation; and

(B) benefits.

(3) A client company cannot include as compensation the following:

(A) an administrative fee;

(B) payments made to a staff leasing company as reimbursement for payments made to independent contractors assigned to the client company and reportable on Internal Revenue Service Form 1099 (or would have been reported if the amount had met the Internal Revenue Service minimum reporting requirement); and

(C) other costs.

(4) A staff leasing company shall determine compensation only for the taxable entity's own employees who are not assigned employees.

(g) Management company. See §3.587 of this title.

(1) A taxable entity that is a management company may not include as wages and cash compensation any amounts reimbursed by a managed entity.

(2) A taxable entity that is a managed entity may subtract wages and cash compensation that are reimbursed to the management company.

(3) A management company shall determine compensation for only those wages and compensation payments that are not reimbursed by a managed entity.

(h) Small employers. This subsection applies to a taxable entity that is a small employer and that has not provided health care benefits to any of its employees in the calendar year preceding the beginning date of its reporting period. Subject to Tax Code, §171.1014, a taxable entity to which this subsection applies that elects to subtract compensation for the purpose of computing its taxable margin under Tax Code, §171.101, may subtract the following health care benefits:

(1) amounts as provided under subsection (c) of this section;

(2) for the first 12-month period on which margin is based and in which the taxable entity provides health care benefits to all of its employees, an additional amount equal to 50% of the cost of health care benefits provided to its employees for that period; and

(3) for the second 12-month period on which margin is based and in which the taxable entity provides health care benefits to all of its employees, an additional amount equal to 25% of the cost of health care benefits provided to its employees for that period.

(4) The term "provide" does not include amounts paid by the employee, officer, director, etc.

(i) Election to subtract compensation. A taxable entity must make an annual election to subtract compensation in computing margin by the due date or at the time the report is filed, whichever is later. The election to subtract compensation is made by filing the franchise tax report using the compensation method.

(1) After the due date of the report, an amended report may not be filed to change the method of computing margin from the compensation deduction to the cost of goods sold deduction.

(2) An amended report may be filed to change the method of computing margin from the compensation deduction to 70% of total revenue or, if qualified, the E-Z Computation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 16, 2009.

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Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 475-0387

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34 TAC §3.590

The Comptroller of Public Accounts proposes an amendment to §3.590, concerning margin: combined reporting.

Subsection (d)(1)(A) is amended to delete the figure $300,000 from the no tax due limit. House Bill 4765, 81st Legislature, 2009, increases the no tax due threshold to $1 million for reports due on or after January 1, 2010 and to $600,000 for reports due on or after January 1, 2012.

Subsection (d)(3) is amended to delete the figure $300,000 as the wages and cash compensation limitation. This paragraph now refers to §3.589(c)(1) of this title (relating to Margin: Compensation) for the limitation amounts as Tax Code, §171.006 requires an adjustment, in even-numbered years, to the maximum per-person wage and cash compensation deduction based on the consumer price index.

Subsection (f)(2) is amended to clarify how to report for a member of a combined group that has a different accounting period.

Subsection (j) is amended to clarify that a combined group will determine its eligibility for the 0.5% tax rate, discounts and E-Z Computation based on the total revenue of the combined group as a whole after eliminations.

Subsection (k)(1) and (2) are amended to reflect the comptroller's new policy, effective for entities that become subject to the franchise tax on or after October 4, 2009, that allows a taxable entity to file an annual report as its first franchise tax report.

Subsection (k)(3)(A) is amended to clarify that a final report must be filed if every member of a combined group ceases doing business in Texas.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by implementing legislation enacted by the 81st Legislature, 2009, and by clarifying reporting procedures for combined groups. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§171.0011, 171.002, 171.0021, 171.1014, 171.1016, 171.152, 171.1532, 171.201, and 171.202.

§3.590. Margin: Combined Reporting.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affiliated group--Entities in which a controlling interest is owned by a common owner, either corporate or noncorporate, or by one or more of the member entities.

(2) Combined group--Taxable entities that are part of an affiliated group engaged in a unitary business and that are required to file a combined group report under Tax Code, §171.1014.

(A) A combined group may not include a taxable entity that conducts business outside the United States if 80% or more of the taxable entity's property and payroll are assigned to locations outside the United States. If either the property factor or payroll factor is zero, the denominator is one. For example, if Corporation Z has no property, but does have payroll located entirely outside the United States, Corporation Z will not be included in the combined group. The combined group may not include a taxable entity that conducts business outside the United States and has no property or payroll if 80% or more of the taxable entity's gross receipts are assigned to locations outside the United States. See Tax Code, §171.1014.

(B) A combined group may not include an exempt entity.

(C) A combined group must include eligible entities even if those entities do not have nexus as described in §3.586 of this title (relating to Margin: Nexus).

(D) Eligible pass-through entities including partnerships, limited liability companies taxed as partnerships under federal law, limited liability companies that are disregarded under federal law and S corporations are included in a combined group.

(E) Passive entities are not included in the combined group; however, the pro rata share of net income from a passive entity shall be included in total revenue to the extent it was not generated by the margin of another taxable entity.

(3) Combined group report--A report that includes the business of all members of the combined group.

(4) Controlling interest.

(A) Controlling interest means:

(i) for a corporation, either more than 50%, owned directly or indirectly, of the total combined voting power of all classes of stock of the corporation, or more than 50% owned directly or indirectly, of the beneficial ownership interest in the voting stock of the corporation;

(ii) for a partnership, association, trust or other entity other than a limited liability company, more than 50%, owned directly or indirectly, of the capital, profits, or beneficial interest in the partnership, association, trust, or other entity;

(iii) for a limited liability company, either more than 50%, owned directly or indirectly, of the total membership interest of the limited liability company or more than 50%, owned directly or indirectly, of the beneficial ownership interest in the membership interest of the limited liability company.

(B) Examples are as follows:

(i) Corporation A owns 10% of Corporation C and 60% of Corporation B, which owns 41% of Corporation C. Corporation A has a controlling interest in Corporation B and a controlling interest in Corporation C of 51% of stock ownership because it has control of the stock owned by Corporation B.

(ii) Corporation A owns 10% of Limited Liability Company C and 15% of Corporation B, which owns 90% of Limited Liability Company C. Corporation A does not have controlling interest in Limited Liability Company C and does not have a controlling interest in Corporation B. Corporation B has a controlling interest in Limited Liability Company C.

(iii) Individual A owns 100% of 10 corporations, each of which owns 10% of Partnership B. Individual A has a controlling interest in each of the ten corporations and in Partnership B.

(iv) Corporation A holds a 70% interest in Partnership B that owns 60% of Limited Liability Company C. Corporation A owns the remaining 40% of Limited Liability Company C. Corporation A owns a controlling interest in Partnership B and, taking into account Company A's direct and indirect ownership of Limited Liability Company C, a 100% controlling interest in Limited Liability Company C.

(v) Corporation A owns 10% of Limited Liability Company C and 45% of Corporation B, which owns 90% of Limited Liability Company C. Corporation A would hold a 10% interest in Limited Liability Company C which would not constitute a controlling interest. Corporation B has a controlling interest in Limited Liability Company C.

(vi) Partnership P is owned equally by Limited Liability Company A, Limited Liability Company B and Limited Liability Company C. Three unrelated individuals each wholly owns one of the limited liability companies. None of the limited liability companies owns more than 50% of Partnership P. There is no controlling interest.

(vii) Individual A and Individual B each owns 50% of Partnership X. Individual A and Individual B each also owns 50% of Partnership Y. Individual A and Individual B are not husband and wife. Since neither individual owns more than 50% of each partnership, neither individual has a controlling interest in the partnerships.

(C) Other circumstances. In addition to the foregoing tests, the comptroller may consider any other circumstances that tend to demonstrate that the more than 50% direct or indirect common ownership test was met or was not met.

(D) Membership termination. Membership in an affiliated group shall be treated as terminated in any year, or fraction thereof, in which the conditions listed in this paragraph are not met, except as follows:

(i) when an affiliate is sold, exchanged, or otherwise disposed of, the membership in an affiliated group shall not be terminated if the requirements of this paragraph are again met immediately after the sale, exchange, or disposition.

(ii) The comptroller may treat the affiliated group as remaining in place if the conditions of this paragraph are again met within a period not to exceed two years.

(E) Attribution. Except as otherwise provided, an entity is owned when a controlling interest is directly held or the interest is constructively owned. An individual constructively owns stock that is owned by his or her spouse.

(F) Membership in more than one group. If an entity is a member of more than one affiliated group, the entity is treated as a member of the affiliated group (or part thereof) with respect to which it has a unitary relationship. If the entity has a unitary relationship with more than one of those affiliated groups, it shall elect to be treated as a member of only one group. The election shall remain in effect until the unitary business relationship between the entity and the other members ceases, or unless revoked with approval of the comptroller.

(5) Reporting entity--The combined group's choice of an entity that is:

(A) the parent entity, if it is part of the combined group, or

(B) the entity that:

(i) is included within the combined group;

(ii) is subject to Texas' taxing jurisdiction; and

(iii) has the greatest Texas business activity during the first period upon which the first report is based, as measured by the Texas receipts after eliminations for that period.

(6) Unitary business--A single economic enterprise that is made up of separate parts of a single entity or of a commonly controlled group of entities that are sufficiently interdependent, integrated, and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts. In determining whether a unitary business exists, the comptroller shall consider any relevant factor, including:

(A) whether:

(i) activities of the group members are in the same general line, such as manufacturing, wholesaling, retailing of tangible personal property, transportation, or finance;

(ii) the activities of the group members are steps in a vertically structured enterprise or process, such as the steps involved in the production of natural resources, including exploration, mining, refining, and marketing; or

(iii) the members are functionally integrated through the exercise of strong centralized management, such as authority over purchasing, financing, product line, personnel, and marketing.

(B) Other factors. In addition, the comptroller may consider other factors that may be applicable, including guidelines in Supreme Court decisions that presume activities are unitary. All affiliated entities are presumed to be engaged in a unitary business.

(C) New entities. When a taxable entity acquires another entity, a presumption exists for finding a unitary relationship during the first reporting period. Any party may rebut such presumption by proving that the taxable entities were not unitary. If such presumption is rebutted, then the taxable entities shall not be considered unitary as of the date of acquisition. When a taxable entity forms another taxable entity, a unitary relationship exists as of the date of formation unless the business is not unitary on a longer term basis. An acquired entity is required to file a report for the period prior to acquisition.

(D) Non-arm's-length prices. Goods or services or both are supplied at non-arm's length prices between or among entities. Existence of arm's-length pricing between entities, however, does not indicate lack of unity.

(E) Existence of benefits from joint, shared or common activity. A discount, cost-saving or other benefit can be shown to result from joint purchases, leaseholds, or other forms of joint, shared or common activities between or among entities.

(F) Relationships of joint, shared or common activity to income-producing operations. In determining whether a joint, shared, or common activity is indicative of a unitary relationship, consideration shall be given to the nature and character of the basic operations of each entity. Such consideration shall include, but not be limited to, the entity's sources of supply, its goods or services produced or sold, its labor force, and market to determine whether the joint, shared, or common activity is directly beneficial to, related to, or reasonably necessary to the income-producing activities of the unitary business.

(G) Holding entities. The tests for a unitary business established by this section apply in determining whether a holding entity is included or excluded from a unitary business.

(7) United States--The 50 states and the District of Columbia. It also includes the territorial waters of the United States and the seabed and subsoil of those submarine areas that are adjacent to the territorial waters of the United States and over which the United States has exclusive rights, in accordance with international law, with respect to the exploration for or exploitation of natural resources. It also includes the possessions and territories of the United States and the Commonwealth of Puerto Rico.

(c) Mandatory combined reporting. A combined group shall file a combined group report. A taxable entity that is not included in a combined report must file a separate report if it is doing business in Texas or is chartered or organized in Texas.

(d) Determination of combined taxable margin and apportionment.

(1) Combined total revenue. A combined group shall determine its total revenue by:

(A) determining the total revenue of each of its members as provided by Tax Code, §171.1011 (including §171.1011(h)) and §3.587 of this title (relating to Margin: Total Revenue) as if the member were an individual taxable entity without regard to the no tax due [~~$300,000~~] limitation provided by Tax Code, §171.002(d)(2);

(B) adding the total revenues of the members determined under subparagraph (A) of this paragraph, together; and

(C) subtracting, to the extent included under Tax Code, §§171.1011(c)(1)(A), (c)(2)(A), or (c)(3), items of total revenue received from a member of the combined group.

(2) Combined cost of goods sold.

(A) A combined group that elects to subtract costs of goods sold shall determine that amount by:

(i) determining the cost of goods sold for each of its members as provided by Tax Code, §171.1012 and §3.588 of this title (relating to Margin: Cost of Goods Sold) as if the member were an individual taxable entity;

(ii) adding the amounts of cost of goods sold determined under clause (i) of this subparagraph, together; and

(iii) subtracting from the amount determined under clause (ii) of this subparagraph, any cost of goods sold amounts paid from one member of the combined group to another member of the combined group, but only to the extent the corresponding item of total revenue was subtracted under paragraph (1)(C) of this subsection.

(B) A member of a combined group may claim as cost of goods sold those costs that qualify under Tax Code, §171.1012, if the goods for which the costs are incurred are owned by another member of the combined group.

(3) Combined compensation. The combined group may not subtract in relation to a person, more than the wages and cash compensation limitation provided in §3.589(c)(1) of this title (relating to Margin: Compensation) [~~$300,000 or the amount determined under Tax Code, §171.006~~], per 12-month period on which margin is based. A combined group that elects to subtract compensation shall determine that amount by:

(A) determining the compensation for each of its members as provided by Tax Code, §171.1013 and §3.589 of this title, as if each member were an individual taxable entity;

(B) adding the amounts of compensation determined under subparagraph (A) of this paragraph, together; and

(C) subtracting from the amount determined under subparagraph (B) of this paragraph, any compensation amounts paid from one member of the combined group to another member of the combined group, but only to the extent the corresponding item of total revenue was subtracted under paragraph (1)(C) of this subsection.

(4) Combined groups are eligible to use the 70% of revenue calculation pursuant to Tax Code, §171.101 or, if qualified, the E-Z Computation pursuant to Tax Code, §171.1016. See §3.584 of this title (relating to Margin: Reports and Payments).

(5) Combined apportionment.

(A) The combined margin is generally apportioned in accordance with §3.591 of this title (relating to Margin: Apportionment).

(B) Except as provided in subparagraph (D) of this paragraph, gross receipts from business done in this state of taxable entities without nexus individually in Texas are excluded from the numerator. For example, sales of tangible personal property shipped into Texas by a member that does not have nexus individually are excluded from the numerator but are included in the denominator.

(C) For each member of the combined group that does not have nexus individually with this state for purpose of taxation, a combined group must, for information purposes only, include in a report filed under Tax Code, §171.201 or §171.202:

(i) the member's gross receipts from business done in this state; and

(ii) the member's gross receipts from business done in this state that are subject to taxation in another state under a throwback law or regulation.

(D) Receipts derived from transactions between members of a combined group that are excluded under Tax Code, §171.1014(c)(3), may not be included in the numerator or denominator of the apportionment factor. However, the numerator of the apportionment factor will include certain sales of tangible personal property made to third party purchasers if the tangible personal property is ultimately delivered to a purchaser in Texas without substantial modification. See Tax Code, §171.1055(b). For example, drop shipments made from a Texas location to a Texas purchaser would be included in Texas receipts based on the amount billed to the third party purchaser if the seller is a member of the combined group and the seller does not have nexus.

(6) Disregarded entities. When reporting revenue, cost of goods sold, compensation and gross receipts for a disregarded entity, that information may be included with the parent; in that event, both entities are presumed to have nexus.

(e) Reporting entity.

(1) Responsibilities of the reporting entity.

(A) Access to records. In addition to the information required to be included in the combined group report, upon request of the comptroller, the reporting entity shall provide access to the tax, financial, and nonfinancial records of entities that do and do not have Texas nexus.

(B) Filing. The reporting entity shall file a combined group report on behalf of the combined group together with all reports and schedules required by the comptroller. Any elections required by the combined group are binding on all members of the group.

(C) Payment. The reporting entity shall timely remit to the comptroller the Texas franchise tax imposed on the combined group.

(D) Authority. The reporting entity may file refund claims, give waivers and execute agreements on behalf of the combined group. Any refund claim, waiver given, agreement or any document executed, shall be considered as having also been given or executed by each combined group member.

(2) Notices. Notices mailed to the reporting entity shall be deemed to have been mailed to each of the taxable entities in the combined group.

(3) Change in the reporting entity. The reporting entity shall change only when the entity (other than the parent) is no longer subject to Texas' jurisdiction to tax or the reporting entity is no longer a member of the combined group, at which time the combined group shall designate another entity that qualifies as its reporting entity and notify the comptroller of the designation.

(f) Accounting period of the combined group.

(1) The combined group's accounting period is determined as follows:

(A) if two or more members of a combined group file a federal consolidated return, the group's accounting period is the federal taxable period of the federal consolidated group;

(B) in all other instances, the accounting period is the federal taxable period of the reporting entity.

(2) Members with different accounting periods. If the federal taxable period of a member differs from the federal taxable period of the combined group, the reporting entity will determine the portion of that member's revenue, cost of goods sold, compensation, etc. to be included by preparing a separate income statement based on federal income tax reporting methods for the period [~~months~~] included in the group's accounting period.

(g) Liability for the combined tax, penalty, and interest. The members of a combined group shall be jointly and severally liable for the combined tax reported on the combined report and any interest and penalty.

(h) Credits. Unless otherwise provided by law, credits generally may be applied against the combined tax liability of the combined group. See §3.594 of this title (relating to Margin: Temporary Credit for Business Loss Carryforwards), and §3.593 of this title (relating to Margin: Credits).

(i) Standard Industrial Classification Code. For a combined group, the revenue from each retail and wholesale trade activity of each of the members of the combined group shall be aggregated for purposes of determining whether the combined group is engaged in retail or wholesale trade. The determination of whether a combined group is engaged in a retail or wholesale trade activity shall be made after eliminations.

(j) Tax rate, discounts, and E-Z Computation. The determination of whether a combined group is eligible for the 0.5% tax rate, discounts from tax liability, and the E-Z Computation under Tax Code, §§171.002, 171.0021, and 171.1016, shall be made based on the total revenue of [~~for~~] the combined group as a whole after eliminations. See §3.584 of this title [~~(relating to Reports and Payments)~~].

(k) Combined report filing. A taxable entity will only be included in a combined group report for the accounting period in which it belongs to the combined group.

(1) Initial reports.

(A) Combined groups. A combined group will not file an initial report. For the period that a combined group exists, the combined group will file only annual reports regardless of whether the reporting entity or any or all of the members of the combined group would have been required to file an initial report if filing as a separate entity.

(B) Members of a combined group. This subparagraph applies to members of a combined group that became subject to the franchise tax prior to October 4, 2009. Members of a combined group that become subject to the tax on October 4, 2009 or later will file only annual reports (see paragraph (2)(B) of this subsection).

(i) A newly-formed member of a combined group will not report its data on a separate initial report but will include its data with the combined group's report for the corresponding accounting period. If a member of a combined group receives a franchise tax initial report filing notice, the entity must return the notice to the comptroller identifying the reporting entity of the combined group unless the entity is required to file a separate initial report under clause (ii) or (iii) of this subparagraph.

(ii) A newly formed member of a combined group that leaves the combined group during the accounting period that would be covered by its initial report is required to file a separate initial report for the period beginning on the date it leaves the group through the date of its last federal [~~normal~~] accounting year end that is at least 60 days prior to the original due date of its initial report. Example: Corporation A is formed on April 3, 2009 [~~2008~~] as a member of Combined Group Z. It is spun off as a separate non-unitary entity effective August 15,

2009 [~~2008~~]. The federal [~~normal~~] accounting year end for all parties is December 31. Corporation A will file a 2010 [~~2009~~] initial report due July 1, 2010 [~~2009~~] for August 15, 2009 [~~2008~~] - December 31, 2009 [~~2008~~], the period after the spin-off of the corporation. Combined Group Z will file a 2010 [~~2009~~] annual report including Corporation A for April 3, 2009 [~~2008~~] - August 14, 2009 [~~2008~~], the period before the spin-off of the corporation.

(iii) A newly-formed entity that is subsequently acquired by a combined group is required to file a separate initial report for the period that is prior to the acquisition date. Example: Corporation A is a separate entity that was formed on November 15, 2008 [~~2007~~] and has a June 30 federal accounting year end. Corporation A was acquired by Combined Group Z effective February 1, 2009 [~~2008~~]. Combined Group Z has a December 31 federal accounting year end. Corporation A will file a 2010 [~~2009~~] initial report due February 12, 2010 [~~2009~~]. Because Corporation A was acquired by Combined Group Z effective February 1, 2009 [~~2008~~], Corporation A will include only the period from November 15, 2008 [~~2007~~] - January 31, 2009 [~~2008~~] on its initial report. Combined Group Z will file a 2010 [~~2009~~] annual report including Corporation A for the period February 1, 2009 [~~2008~~] - December 31, 2009 [~~2008~~].

(2) Annual reports.

(A) Combined groups. For the period that a combined group exists, the combined group will file only annual reports.

(B) Members of a combined group.

(i) For any accounting period that an entity is not part of a combined group, the entity must file a separate report. Example: Corporation B is a separate entity that began filing franchise tax reports in 2000 and has a December 31 federal accounting year end [~~from January 1, 2008 - June 30, 2008~~]. Corporation B was acquired by Combined Group X effective July 1, 2009 [~~2008~~]. Combined Group X has a March 31 federal accounting year end. Corporation B is sold by Combined Group X to Combined Group Y effective October 1, 2009 [~~2008~~]. Combined Group Y has a December 31 federal accounting year end. Corporation B will file a 2010 [~~2009~~] annual report for the period January 1, 2009 [~~2008~~] - June 30, 2009 [~~2008~~]. Combined Group X will file a 2010 [~~2009~~] annual report for the period April 1, 2008 [~~2007~~] - March 31, 2009 [~~2008~~]. Combined Group X will not include Corporation B in its 2010 [~~2009~~] annual report because Corporation B was not part of the combined group during the accounting period on which the report is based. Combined Group X will include Corporation B in its 2011 [~~2010~~] annual report for the period July 1, 2009 [~~2008~~] - September 30, 2009 [~~2008~~]. Combined Group Y will file a 2010 [~~2009~~] annual report for the period January 1, 2009 [~~2008~~] - December 31, 2009 [~~2008~~] and will include Corporation B for the period October 1, 2009 [~~2008~~] - December 31, 2009 [~~2008~~].

(ii) A taxable entity formed on October 4, 2009, or later, that is a member of a combined group and that leaves the combined group during the accounting period that would be covered by its first annual report, is required to file a separate annual report for the period beginning on the date it leaves the group through the date of its last federal accounting year end in the calendar year prior to the year its first annual report is originally due. Example: Corporation A is formed on April 3, 2010 as a member of Combined Group Z. It is spun off as a separate non-unitary entity effective August 15, 2010. The federal accounting year end for all parties is December 31. Corporation A will file a 2011 annual report due May 15, 2011 for August 15, 2010 - December 31, 2010, the period after the spin-off of the corporation. Combined Group Z will file a 2010 annual report including Corporation A for April 3, 2010 - August 14, 2010, the period before the spin-off of the corporation.

(iii) A taxable entity formed on October 4, 2009, or later, and is subsequently acquired by a combined group is required to file a first annual report for the period that is prior to the acquisition date. Example: Corporation A is a separate entity that was formed on June 15, 2010 and has a December 31 federal accounting year end. Corporation A was acquired by Combined Group Z effective December 1, 2010. Combined Group Z has a December 31 accounting year end. Corporation A will file a 2011 annual report due May 15, 2011. Because Corporation A was acquired by Combined Group Z effective December 1, 2010, Corporation A will include only the period from June 15, 2010 - November 30, 2010 on its annual report. Combined Group Z will file a 2010 annual report including Corporation A for the period December 1, 2010 - December 31, 2010.

(3) Final reports.

(A) Combined groups. If every member of a combined group ceases doing business in Texas, a final report will need to be filed and paid before a taxable entity will receive clearance from the comptroller for termination, cancellation, withdrawal or merger. In all other cases, for the period a combined group exists, the combined group will file only annual reports. [~~A combined group will not file a final report. For the period that a combined group exists, the combined group will file only annual reports.~~]

(B) Members of a combined group.

(i) A member of a combined group that ceases doing business in Texas will not file a final report. The data that would have been reported on the final report will be included in the combined group's annual report for the corresponding accounting period. If a member of a combined group receives a franchise tax final report filing notice, the entity must return the notice to the comptroller identifying the reporting entity of the combined group unless the entity is required to file a separate final report under clause (ii) or (iii) of this subparagraph.

(ii) A separate entity that joins a combined group and then ceases doing business in Texas in the accounting period that would be covered by a final report is required to file a final report for the period that is prior to the acquisition date. The period from the acquisition date through the date the entity ceased doing business in Texas will be reported on the combined group's annual report for the corresponding period. Example: Corporation C is a separate entity that has a December 31 accounting year end. Corporation C was acquired by Combined Group W effective July 1, 2008. Combined Group W also has a December 31 accounting year end. On October 31, 2008 Corporation C is dissolved. Corporation C will file a final report due December 30, 2008 for the period January 1, 2008 - June 30, 2008, which is the period before Corporation C was purchased by Combined Group W. Combined Group W will file a 2009 annual report and include Corporation C for the period July 1, 2008 - October 31, 2008.

(iii) A member of a combined group that leaves the combined group and then ceases doing business in Texas during the accounting period that would be covered by a final report is required to file a final report for the period from the date the entity left the combined group through the date that the entity ceased doing business in Texas. Example: Corporation C is a member of Combined Group W. Both Corporation C and Combined Group W have a September 30 accounting year end. Corporation C leaves the combined group effective May 1, 2008. On August 15, 2008, Corporation C is dissolved. Corporation C will file a final report due October 14, 2008 for the period May 1, 2008 - August 15, 2008, which is the period after Corporation C left Combined Group W. Combined Group W will file a 2009 annual report and will include Corporation C for the period October 1, 2007 - April 30, 2008.

(4) Electronic funds transfer. If any one member of a combined group receives notice that it is required to electronically transfer franchise tax payments, then the combined group is required to electronically transfer payments.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 16, 2009.

TRD-200904653
Ashley Harden
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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34 TAC §3.591

The Comptroller of Public Accounts proposes an amendment to §3.591, concerning margin: apportionment.

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

Subsection (e)(16) is amended to implement House Bill 4611, 81st Legislature, 2009. Effective for reports originally due on or after January 1, 2010, if a lending institution categorizes a loan or security as "Securities Available for Sale" or "Trading Securities" under Financial Accounting Standard No. 115, the gross proceeds of the sale of that loan or security are considered gross receipts. Subsection (e)(19) is amended to clarify that the sourcing of a passive entity's net distributive loss is the principal place of business of the passive entity. The reference to paragraph (30) in subsection (e)(20) has been corrected to reference paragraph (29).

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by implementing legislation enacted by the 81st Legislature, 2009, and by clarifying sourcing for passive entities. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§171.103, 171.1055, 171.106, and 171.1121.

§3.591. Margin: Apportionment.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008, except as otherwise noted.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Capital asset--Any asset, other than an investment, that is held for use in the production of income, and that is subject to depreciation, depletion or amortization.

(2) Commercial domicile--The principal place from which the trade or business of the entity is directed.

(3) Employee retirement plan--A plan or other arrangement that qualifies under Internal Revenue Code (IRC), §401(a), or that satisfies the requirement of IRC, §403, or a government plan described in IRC, §414(d).

(4) Gross receipts--The amount determined as total revenue under §3.587 of this title (relating to Margin: Total Revenue), except for a taxable entity taking a deduction for uncompensated care or pro bono services or an entity for which subsection (e)(16) of this section, applies.

(5) Internal Revenue Code--The Internal Revenue Code of 1986 in effect for a specified tax year as provided by Tax Code, §171.0001.

(6) Investment--Any non-cash asset that is not a capital asset.

(7) Legal domicile--The legal domicile of a corporation or limited liability company is its state of formation. The legal domicile of a partnership, trust, or joint venture is the principal place of business of the partnership, trust, or joint venture. The principal place of business of a partnership, trust, or joint venture is the location of its day-to-day operations. If the day-to-day operations are conducted equally or fairly evenly in more than one state, then the principal place of business is the commercial domicile.

(8) Location of payor--The legal domicile of the payor.

(9) Security--An instrument defined under Internal Revenue Code, §475(c)(2), and includes instruments described by §475(e)(2)(B), (C), and (D) of that code.

(10) Tax reporting period--The period upon which the tax is based under Tax Code, §171.1532 or §171.0011.

(11) Taxable entity--Any entity upon which tax is imposed under Tax Code, §171.0002(a) and not specifically excluded under Tax Code, §171.0002(b) or §171.0002(c). See also §3.581 of this title (relating to Margin: Taxable and Nontaxable [~~Non-Taxable~~] Entities).

(c) Apportionment formula. A taxable entity's margin is apportioned to this state to determine the amount of franchise tax due by multiplying the taxable entity's margin by a fraction, the numerator of which is the taxable entity's gross receipts from business done in this state and the denominator of which is the taxable entity's gross receipts from its entire business except as provided by this subsection.

(1) Taxable entities that have margin that is derived, directly or indirectly from the sale of services to or on behalf of a regulated investment company as defined by IRC, §851(a), should refer to Tax Code, §171.106(b), relating to the apportionment of gross receipts from services for regulated investment companies.

(2) Taxable entities that have margin that is derived, directly or indirectly, from the sale of management, administration, or investment services to an employee retirement plan, as defined in sub-

section (b)(3) of this section, should refer to Tax Code, §171.106(c), relating to the apportionment of gross receipts from services for employee retirement plans.

(d) General rules for reporting gross receipts.

(1) A taxable entity that files an annual report must report gross receipts based on the business done by the taxable entity beginning with the day after the date upon which the previous report was based, and ending with the last accounting period ending date for federal income tax purposes ending in the calendar year before the calendar year in which the report is originally due. If the taxable entity has not filed a previous report and must file an annual report, see §3.595 of this title (relating to Margin: Transition [~~Rule~~]).

(2) A taxable entity that files an initial report must report gross receipts based on its activities commencing with the beginning date, as described in §3.584 of this title (relating to Margin: Reports and Payments), and ending on the last accounting period ending date for federal income tax purposes that is at least 60 days before the original due date of the initial report.

(3) Taxable entities that are members of an affiliated group that are part of a unitary business must file a combined franchise tax report. See §3.590 of this title (relating to Margin: Combined Reporting), for determining gross receipts for a combined report.

(4) When a taxable entity computes gross receipts for apportionment, the taxable entity is deemed to have elected to use the same methods that the taxable entity used in filing its federal income tax return.

(5) Any item of revenue that is excluded from total revenue under Texas law or United States law is excluded from gross receipts everywhere and gross receipts in Texas as provided by Tax Code, §171.1055(a). For example, any amount that is excluded from total revenue under the Internal Revenue Code, §78 or §§951 - 964, is excluded from gross receipts.

(6) A taxable entity that uses a 52 - 53 week accounting year end and that has an accounting year that ends during the first four days of January of the year in which the report is originally due may use the preceding December 31 as the date through which margin is computed.

(7) Any item of allocated revenue excluded under §3.587(c)(9) of this title [~~(relating to Margin: Total Revenue)~~] is excluded from Texas receipts and receipts everywhere.

(e) Treatment of specific items in the computation of gross receipts.

(1) Bad debt recoveries. Bad debt recoveries are gross receipts.

(2) Capital assets and investments. Except as provided by paragraph (16) of this subsection, net gains and losses from sales of investments and capital assets must be added to determine the total gross receipts from such transactions. If both Texas and out-of-state sales have occurred, then a separate calculation of net gains and losses on Texas sales must be made. If the combination of net gains and losses results in a net loss, the taxable entity should net the loss against other receipts, but not below zero. In no instance shall the apportionment factor be greater than 1. Net gain on sales of intangibles held as capital assets or investments is apportioned to the location of the payor. Examples of intangibles include, but are not limited to, stocks, bonds, commodities, futures contracts, patents, copyrights, licenses, trademarks, franchises, goodwill, and general receivable rights.

(3) Computer software services and programs. Gross receipts from the sale of computer software services are apportioned to the location where the services are performed. Gross receipts from the sale of a computer program (as the term "computer program" is defined in §3.308 of this title (relating to Computers--Hardware, Software, Services and Sales)), are receipts from the sale of an intangible asset and are apportioned to the legal domicile of the payor.

(4) Condemnation. Revenues from condemnation that result from the taking of property are gross receipts that are apportioned based on the location of the property condemned.

(5) Debt forgiveness. If a creditor releases any part of a debt, then the amount that the creditor forgives is a gross receipt that is apportioned to the legal domicile of the creditor.

(6) Debt retirement. Revenues from the retirement of a taxable entity's own indebtedness, such as through the taxable entity's purchase of its own bonds at a discount, are gross receipts that are apportioned to the taxable entity's legal domicile. The indebtedness is treated as an investment in the determination of the amount of gross receipts.

(7) Deemed sales of assets under Internal Revenue Code, §338. Amounts that are deemed to have been received by the target taxable entity are treated as sales of assets by the target taxable entity, and are apportioned according to rules that otherwise apply to sales of such assets under Tax Code, Chapter 171, or this section. For the purposes of this paragraph, the purchaser of the target's stock is considered the purchaser of the assets.

(8) Dividends and/or interest.

(A) Dividends that are recognized as a reduction of the taxpayer's basis in stock of a taxable entity for federal income tax purposes are not gross receipts. Dividends that exceed the taxpayer's basis for federal income tax purposes that are recognized as a capital gain are treated as dividends for apportionment purposes.

(B) The following are excluded from Texas receipts and receipts everywhere:

(i) dividends from a subsidiary, associate, or affiliated taxable entity that does not transact a substantial portion of its business or regularly maintain a substantial portion of its assets in the United States;

(ii) schedule C special deductions that are excluded from total revenue;

(iii) dividends and/or interest on federal obligations that are excluded from total revenue;

(iv) interest that is exempt from federal income tax.

(C) Dividends and/or interest that are received from a corporation or other sources are apportioned to the legal domicile of the payor.

(D) Dividends and/or interest that are received from a national bank are apportioned to Texas if the bank's principal place of business is located in Texas. Dividends and/or interest that are received from a bank that is organized under the Texas Banking Code are apportioned to Texas.

(E) A banking corporation may exclude from its Texas gross receipts interest that is earned on federal funds and interest that is earned on securities that are sold under an agreement to repurchase and that are held in a correspondent bank that is domiciled in Texas, but the banking corporation must include the interest in its gross receipts everywhere.

(9) Exchanges of property. Exchanges of property are included in gross receipts to the extent that the exchange is recognized as a taxable transaction for federal income tax purposes. Such exchange must be included in receipts based on the gross exchange value, unless otherwise required under this section.

(10) Federal enclave. All revenues from a taxable entity's sales, services, leases, or other business activities that are transacted on a federal enclave that is located in Texas are Texas receipts, unless otherwise excepted by this section.

(11) Insurance proceeds.

(A) Business interruption insurance proceeds are gross receipts when the proceeds are intended to replace lost profits. Such receipts are apportioned to the legal domicile of the payor of the proceeds.

(B) Revenues from fire and casualty insurance proceeds are apportioned to the location of the damaged or destroyed property.

(12) Internet access fee. A fee that is charged to obtain access to the World Wide Web in Texas is a Texas gross receipt.

(13) Leases and subleases.

(A) Revenues from the lease or sublease (or rental or subrental) of real property are apportioned to the location of the property.

(B) Revenues from the lease or sublease (or rental or subrental) of tangible personal property are apportioned to the location of the property. If the property is used both inside and outside Texas, then lease payments are apportioned based on the number of days that the tangible personal property was used in Texas divided by the number of days that the tangible personal property was used everywhere. If the amount of revenue that is due under the lease is based on mileage, then the lease payments are apportioned based on the number of miles in Texas divided by the number of miles everywhere.

(C) If a lump sum is charged for leased or subleased (or rented or subrented) property that is located both inside and outside Texas, then the allocation of such revenue is based on the rental value of each item of property.

(D) Revenues from the lease or sublease (or rental or subrental) of a vessel that engages in commerce are apportioned to Texas based on the number of days that the vessel is engaged in commerce in Texas waters divided by the number of days that the vessel is engaged in commerce everywhere.

(E) If a lease, sublease, rental, or subrental of real property or tangible personal property is treated as a sale for federal income tax purposes, then the receipts from the transaction are apportioned in the same manner as a sale. Any portion of the payments that the contracting parties designate as interest is interest receipts.

(14) Litigation awards. Revenues that are realized from litigation awards are gross receipts that are apportioned to the legal domicile of the payor of the proceeds; however, if the litigation awards are intended to replace receipts for which another apportionment rule is provided in this section, then the apportionment must be made in accordance with that rule. For example, if a taxable entity sues a Delaware corporation to recover on a sale of goods delivered to a Texas location, then a judgment for the amount of that sale would not convert the receipts from Texas receipts to Delaware receipts. See subsection (f) of this section, for the apportionment of receipts from judgments, compromises, or settlements that relate to natural gas production.

(15) Loan servicing of real property. Receipts from the servicing of loans secured by real property are apportioned to the location of the collateral real property that secures the loan being serviced.

(16) Loans and securities.

(A) If a loan or security is treated as inventory of the seller for federal income tax purposes, the gross proceeds of the sale of that loan or security are considered gross receipts.

(B) For reports originally due on or after January 1, 2010, if a lending institution categorizes a loan or security as "Securities Available for Sale" or "Trading Securities" under Financial Accounting Standard No. 115, the gross proceeds of the sale of that loan or security are considered gross receipts. In this subparagraph, "Financial Accounting Standard No. 115" means the Financial Accounting Standard No. 115 in effect as of January 1, 2009, not including any changes made after that date.

(17) Membership or enrollment fees paid for access to benefits. Membership or enrollment fees paid for access to benefits should be considered gross receipts from the sale of an intangible asset and are apportioned to the legal domicile of the payor.

(18) Mixed transactions. If a transaction involves elements of both a sale of tangible personal property and a service, but no documentation exists to show separate charges for the sale and service elements, then the comptroller may determine the amounts that are allocable to each element based on fair values or on any available evidence.

(19) Net distributive income. The net distributive income or loss from a passive entity that is included in total revenue is apportioned to the principal place of business of the passive entity.

(20) Newspapers or magazines. All advertising revenues of a newspaper or magazine, including those revenues derived from out-of-state advertisements, are apportioned to Texas based on the number of newspapers or magazines distributed in Texas. All other receipts must be apportioned in accordance with the apportionment rules otherwise set out in this section. For example, receipts from sales of newspapers or magazines are to be apportioned based on paragraph (29) [~~(30)~~] of this subsection.

(21) Patents, copyrights, and other intangible rights.

(A) Receipts from the use of intangibles.

(i) Revenues from a patent royalty are included in Texas receipts to the extent that the patent is utilized in production, fabrication, manufacturing, or other processing in Texas.

(ii) Revenues from a copyright royalty are included in Texas receipts to the extent that the copyright is utilized in printing or other publication in Texas.

(iii) Revenues that the owner of a trademark, franchise, or license receives are included as Texas receipts to the extent the trademark, franchise or license is used in Texas.

(iv) Royalties from an affiliated taxable entity that does not transact a substantial portion of its business or regularly maintain a substantial portion of its assets in the United States are excluded from Texas receipts and receipts everywhere.

(B) Sales. Sales of intangibles are apportioned based on the location of payor.

(22) Radio/television. All advertising revenues of a radio or television station that broadcasts or transmits from a location in Texas constitute Texas receipts, even though some of the listening or viewing audiences are located outside Texas. All other receipts must

be apportioned in accordance with the apportionment rules otherwise set out in this section.

(23) Real property. Revenues from the sale, lease, rental, sublease, or subrental of real property, including mineral interests, are apportioned to the location of the property. Royalties from mineral interests are considered revenue from real property.

(24) Sales taxes. State or local sales taxes that are imposed on the customer, but are collected by a seller are not gross receipts of the seller. However, discounts that a seller is allowed to take in remittance of the collected sales tax are gross receipts to the seller.

(25) Securities. Receipts from the sale of securities are apportioned based on the location of the payor. If securities are sold through an exchange, and the buyer cannot be identified, then 7.9% of the revenue is a Texas receipt.

(26) Services. Receipts from a service are apportioned to the location where the service is performed. If services are performed both inside and outside Texas, then such receipts are Texas receipts on the basis of the fair value of the services that are rendered in Texas.

(A) Taxable entities that have margin that is derived, directly or indirectly, from the sale of services to or on behalf of a regulated investment company should refer to Tax Code, §171.106(b), for information on apportionment of such margin.

(B) Taxable entities that have margin that is derived, directly or indirectly, from the sale of management, administration, or investment services to an employee retirement plan as defined in subsection (b)(3) of this section, should refer to the Tax Code, §171.106(c), for information on apportionment of such margin.

(C) Receipts from services that a defense readjustment project performs in a defense economic readjustment zone are not Texas receipts.

(27) Services procurement. Revenues for the procurement of services are apportioned to the place where the service procurement is performed.

(28) Subsidies or grants. Proceeds of subsidies or grants that a taxable entity receives from a governmental agency are gross receipts, except when the funds are required to be expended dollar-for-dollar (i.e., passed through) to third parties on behalf of the agency. Receipts from a governmental subsidy or grant are apportioned in the same manner as the item to which the subsidy or grant was attributed. For example, if a taxable entity qualifies for a grant to conduct research for the government, then the receipts from that grant are receipts from a service and are apportioned to the location where the research is performed.

(29) Tangible personal property. Examples of transactions that involve the sale of tangible personal property and result in Texas receipts include, but are not limited to, the following:

(A) the sale of tangible personal property that is delivered in Texas to a purchaser. Delivery is complete upon transfer of possession or control of the property to the purchaser, an employee of the purchaser, or transportation vehicles that the purchaser leases or owns. FOB point, location of title passage, and other conditions of the sale are not relevant to the determination of Texas gross receipts;

(B) the sale of tangible personal property that is delivered in Texas to an employee or transportation agent of an out-of-state purchaser. A carrier is an employee or agent of the purchaser if the carrier is under the supervision and control of the purchaser with respect to the manner in which goods are transported;

(C) the sale and delivery in Texas of tangible personal property that is loaded into a barge, truck, airplane, vessel, tanker, or any other means of conveyance that the purchaser of the property leases and controls or owns. The sale of tangible personal property that is delivered in Texas to an independent contract carrier, common carrier, or freight forwarder that a purchaser of the property hires results only in gross receipts everywhere if the carrier transports or forwards the property to the purchaser outside this state;

(D) the sale of tangible personal property with delivery to a common carrier outside Texas, and shipment by that common carrier to a purchaser in Texas;

(E) the sale of oil or gas to an interstate pipeline company, with delivery in Texas;

(F) the sale of tangible personal property that is delivered in Texas to a warehouse or other storage facility that the purchaser owns or leases;

(G) the sale of tangible personal property that is delivered to and stored in a warehouse or other storage facility in Texas at the purchaser's request, as opposed to a necessary delay in transit, even though the property is subsequently shipped outside Texas;

(H) the drop shipment of tangible personal property in Texas. A drop shipment is a shipment of tangible personal property from a seller directly to a purchaser's customer, at the request of the purchaser, without passing through the hands of the purchaser. This results in Texas gross receipts for the seller and the purchaser.[;]

(30) Telephone companies.

(A) Revenues from telephone calls that both originate and terminate in Texas are Texas receipts.

(B) Revenues from telephone calls that originate in Texas but terminate outside of Texas or that originate outside of Texas but terminate in Texas are excluded from Texas receipts.

(C) Revenues from telecommunication services other than those services in subparagraph (A) or (B) of this paragraph are Texas receipts if the services are performed in Texas. For example, a telephone company that provides a long distance carrier access to the telephone company's local exchange network in Texas is performing a service in Texas. Any fee that the telephone company charges the long distance carrier for access to the local exchange network in Texas is a Texas receipt regardless of whether the access is related to an interstate call. A fee that is charged to obtain access to a local exchange network in Texas and that is based on the duration of an interstate telephone call may be excluded from Texas receipts.

(31) Texas waters. Revenues from transactions that occur in Texas waters are Texas receipts. Texas waters are considered to extend to 10.359 statute miles, or nine nautical miles, from the Texas coastline.

(32) Transportation companies. Transportation companies must report Texas receipts from transportation services in intrastate commerce by:

(A) the inclusion of revenues that are derived from the transportation of goods or passengers in intrastate commerce within Texas; or

(B) the multiplication of total transportation receipts by total mileage in the transportation of goods and passengers that move in intrastate commerce within Texas divided by total mileage everywhere.

(f) Natural gas production.

(1) Revenues that a gas producer realizes from the contract price of gas that the gas producer produces and that the purchaser takes pursuant to the terms of sales are gross receipts and are apportioned to Texas, if the gas is delivered in Texas.

(2) Revenues that a gas producer realizes from a purchaser's payment under a sale or purchase contract for gas to be produced even if no gas is produced and delivered to the purchaser, are gross receipts and are apportioned to the legal domicile of the payor.

(3) Revenues that a gas producer realizes from a purchaser's payments to terminate a gas purchase contract are gross receipts and are apportioned to the legal domicile of the payor.

(4) Revenues that a gas producer realizes from a contract amendment that relates to the price of the gas sold are gross receipts from the sales of gas and are apportioned to Texas if delivery is made to a location in Texas. Revenues that the gas producer realizes from a contract amendment that relates to a provision other than the price of gas sold are gross receipts and are apportioned to the legal domicile of the payor.

(5) Revenues that a gas producer realizes from litigation awards for a breach of contract, reimbursements for litigation-related expenses (e.g., documented attorney's fees or court costs), or interest (upon which the parties have agreed, that the records of the producer reflects, or in an amount that a court has ordered) are gross receipts and are apportioned to the legal domicile of the payor.

(6) Revenues that a gas producer realizes from a judgment, compromise, or settlement relating to the recovery of a contract price of gas produced are gross receipts and are apportioned to Texas to the extent the contract specified delivery to a location in Texas. Revenues that a gas producer realizes from a judgment, compromise, or settlement that relates to several claims or causes of action shall be prorated based upon the documented amounts due under the contract for each claim or cause of action according to the records of the producer. For example, a settlement sum of $100,000 for a pricing dispute of $25,000 and for failure to pay for gas not taken in the amount of $225,000, would result in receipts of $10,000 from gas sales (100,000 X 25,000/250,000) and receipts from other business of $90,000 (100,000 X 225,000/250,000). Records of the producer shall include, but are not limited to the following: contracts, settlement agreements, accounting records and entries, court pleadings and worksheets, including calculations reflecting settlement amounts.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Ashley Harden
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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34 TAC §3.593

The Comptroller of Public Accounts proposes an amendment to §3.593, concerning margin: franchise tax credits. This section is amended to implement House Bill 469, 81st Legislature, 2009.

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

Subsection (b) is amended to add the definition of a clean energy project.

Subsection (i) is added to implement House Bill 469, 81st Legislature, 2009, which provides a franchise tax credit to entities implementing a clean energy project.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by implementing legislation enacted by the 81st Legislature, 2009. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Government Code, Chapter 490, Subchapter H.

§3.593. Margin: Franchise Tax Credits.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008, except as otherwise noted.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Research and development credit--A research and development credit established under Tax Code, Chapter 171, Subchapter O, on a franchise tax report originally due prior to January 1, 2008.

(2) Jobs creation credit--A jobs creation credit established under Tax Code, Chapter 171, Subchapter P, on a franchise tax report originally due prior to January 1, 2008.

(3) Investment credit--An investment credit established under Tax Code, Chapter 171, Subchapter Q, on a franchise tax report originally due prior to January 1, 2008 and an investment credit established under Tax Code, Chapter 171, Subchapter Q-1.

(4) Enterprise project--A person designated as an enterprise project under Government Code, Chapter 2303, on or after September 1, 2001, but before January 1, 2005.

(5) Enterprise zone--An area designated as an enterprise zone under Government Code, §2303.003.

(6) Qualified business--A person certified as a qualified business under Government Code, §2303.402.

(7) Qualified capital investment--Tangible personal property that is first placed in service in an enterprise zone by a qualified business that has been designated as an enterprise project and that is de-

fined in IRS Reg. §1.48-1(c) and described in Internal Revenue Code, §1245(a), subject to depreciation or amortization including engines, machinery, tools, and implements that are used in a trade or business, or are held for investment. The term includes transportation costs and direct labor costs necessary to fabricate, install or place the tangible personal property in service. The term does not include real property or buildings and their structural components. Property that is leased under a capitalized lease is considered a "qualified capital investment," but property that is leased under an operating lease is not considered a "qualified capital investment." Property that is expensed under Internal Revenue Code, §179, is not considered a "qualified capital investment." The term also does not include all costs included in the depreciable basis such as indirect labor costs, interest, intangibles and overhead.

(8) Tangible personal property first placed in service in an enterprise zone includes tangible personal property that is:

(A) purchased by an enterprise project for placement in an incomplete improvement that is under active construction or other physical preparation;

(B) identified by a purchase order, invoice, billing, sales slip, or contract; and

(C) physically present at the enterprise project's qualified business site, as defined by Government Code, §2303.003, and in use by the enterprise project on the original due date of the report on which the credit is taken.

(9) Clean energy project--A project as defined by Natural Resources Code, §120.001(2).

(c) Information required. A taxable entity that claims a credit under this section must submit a credit schedule with each report that a credit is claimed.

(d) Limitations.

(1) The total research and development credit, jobs creation and investment credits that a taxable entity claims may not exceed the amount of franchise tax due for the report after any other applicable credits.

(2) A taxable entity may not convey, assign, or transfer to another entity the credits that this section provides, unless all of the assets of the taxable entity are conveyed, assigned, or transferred to the entity in the same transaction.

(e) Research and development credit.

(1) Carryforward. If a taxable entity established a research and development credit on a franchise tax report originally due prior to January 1, 2008, that exceeded the tax limitations, then the taxable entity may continue to carry the unused credit forward on each consecutive report until the earlier of the date the credit would have expired under Tax Code, Chapter 171, Subchapter O, or December 31, 2027.

(2) Report limitation. The total research and development credit carryforward that a taxable entity may claim for a report may not exceed 50% of the amount of franchise tax that is due for the report before any other tax credits are applied.

(3) Combined group. A taxable entity that is a combined group may claim the unused credit carried forward for each member entity. The limitation in subsection (d) of this section and report limitation in paragraph (2) of this subsection shall be applied to the amount of franchise tax due of the combined group before any other tax credits are applied.

(f) Jobs creation credit.

(1) Carryforward. If a taxable entity established a jobs creation credit on a franchise tax report originally due prior to January 1, 2008, that exceeded the tax limitations, then the taxable entity may continue to carry the unused credit forward on each consecutive report until the earlier of the date the credit would have expired under Tax Code, Chapter 171, Subchapter P, or December 31, 2012.

(2) Report limitation. The total jobs creation credit carryforward that a taxable entity may claim for a report may not exceed 50% of the amount of franchise tax that is due for the report before any other tax credits are applied.

(3) Combined group. A taxable entity that is a combined group may claim the unused credit carried forward for each member entity. The limitation in subsection (d) of this section and report limitation in paragraph (2) of this subsection shall be applied to the amount of franchise tax due of the combined group before any other tax credits are applied.

(g) Investment credit.

(1) Installment. A taxable entity that has any unused installments from an investment credit established on a franchise tax report originally due prior to January 1, 2008, may claim the remaining installments on consecutive reports beginning with reports originally due on or after January 1, 2008.

(2) Carryforward. A carryforward is the remaining portion of an installment that cannot be claimed in the current year because of the limitations that are stated in subsection (d)(1) of this section or this paragraph. A carryforward is added to the next year's installment of the credit in determination of the limitations for that year. A credit carryforward from a previous report must be used before the current year installment. The taxable entity may carry the unused credit forward on each consecutive report until the earlier of the date the credit would have expired under Tax Code, Chapter 171, Subchapter Q, or December 31, 2012.

(3) Report limitation. The total investment credit that a taxable entity may claim for a report including any credit under subsection (h) of this section, may not exceed 50% of the amount of franchise tax that is due for the report before any other tax credits are applied.

(4) Ineligibility.

(A) A taxable entity may not take any remaining installment of the credit, (except the taxable entity is permitted to take the portion of an installment that accrued in a previous year and was carried forward pursuant to paragraph (2) of this subsection), if, during one of the periods used to determine margin for a report on which an installment could be claimed, the taxable entity:

(i) disposes of the qualified capital investment;

(ii) takes the qualified capital investment out of service;

(iii) moves the qualified capital investment out of the strategic investment area; or

(iv) fails to pay an average weekly wage, at the location for which the credit is claimed, that amounts to at least 110% of the county average weekly wage.

(B) For purposes of subparagraph (A)(i) - (iii) of this paragraph, an installment may still be taken if the qualified capital investment is replaced at the same location within 90 days with a new qualified capital investment of equal or greater value.

(5) Combined group. A taxable entity that is a combined group may claim any remaining installments and unused credit carried

forward for each member entity. The limitation in subsection (d) of this section and report limitation in paragraph (3) of this subsection shall be applied to the amount of franchise tax due of the combined group before any other tax credits are applied.

(h) Enterprise projects. A taxable entity that has been designated an enterprise project on or after September 1, 2001, but before January 1, 2005, may establish a credit that equals 7.5% of the qualified capital investment made on or after January 1, 2005, and before January 1, 2007. Subject to paragraph (4) of this subsection, an enterprise project may claim the entire credit established on a report originally due on or after January 1, 2008, and before January 1, 2009.

(1) Carryforward. If an enterprise project is eligible for a credit that exceeds the limitation under paragraph (4) of this subsection, the enterprise project may carry the unused credit forward for not more than five consecutive reports.

(2) Ineligibility.

(A) An enterprise project is not eligible for a credit under this subsection if the enterprise project claimed a credit under Tax Code, Chapter 171, Subchapter Q, before the repeal of that subchapter on January 1, 2008.

(B) A taxable entity, other than a combined group, may not claim the credit under this subsection unless the taxable entity was, on May 1, 2006, subject to the tax imposed by this chapter as it existed on that date.

(C) A taxable entity that establishes its eligibility for an investment credit is not eligible to claim a franchise tax reduction that is authorized under Tax Code, §171.1015.

(3) Combined group. A taxable entity that is a combined group may claim the credit for each member entity that was, on May 1, 2006, subject to the tax imposed by this chapter as it existed on that date and shall compute the amount of the credit for that member as provided by this subsection.

(4) Report limitation. The total investment credit that a taxable entity claims for a report, including the amount of any installment or carryforward under subsection (g)(1) and [~~(g)~~](2) of this section may not exceed 50% of the amount of franchise tax that is due for the report before any other tax credits are applied.

(5) Expiration. This subsection expires on December 31, 2009. This expiration does not affect the carryforward of a credit that was established on a report that was originally due before this expiration date.

(i) Clean energy project credit. A clean energy project credit established under Government Code, Chapter 490, Subchapter H, as follows:

(1) Eligibility. A franchise tax credit shall be issued to a taxable entity implementing a clean energy project in this state in connection with the construction of a new facility after:

(A) the Railroad Commission of Texas (the commission) has issued a certificate of compliance for the project to the entity as provided by Natural Resources Code, §120.004. The commission may not issue a certificate of compliance for more than three clean energy projects;

(B) the construction of the project has been completed;

(C) the electric generating facility associated with the project is fully operational;

(D) the Bureau of Economic Geology of the University of Texas at Austin verifies to the comptroller that the electric generating facility associated with the project is sequestering at least 70% of the carbon dioxide resulting from or associated with the generation of electricity by the facility; and

(E) the owner or operator of the project has entered into an interconnection agreement relating to the project with the Electric Reliability Council of Texas.

(2) Credit calculation. The total amount of the franchise tax credit that may be issued to the entity designated in the certificate of compliance for a clean energy project is equal to the lesser of:

(A) 10% of the total capital cost of the project, including the cost of designing, engineering, permitting, constructing, and commissioning the project, the cost of procuring land, water, and equipment for the project, and all fees, taxes, and commissions paid and other payments made in connection with the project but excluding the cost of financing the capital cost of the project; or

(B) $100 million.

(3) Report limitation. The amount of the franchise tax credit for each report year is calculated by determining the amount of franchise tax that is due based on the taxable margin generated by a clean energy project from the generation and sale of power and the sale of any products that are produced by the electric generation facility. The amount of the franchise tax credit claimed under this section for a report year may not exceed the amount of franchise tax attributable to the clean energy project for that report year.

(4) Issuance Restriction. A franchise tax credit for a clean energy project may not be issued before September 1, 2013.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Ashley Harden
General Counsel
Comptroller of Public Accounts
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CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER C. APPRAISAL DISTRICT ADMINISTRATION

34 TAC §9.415

The Comptroller of Public Accounts (comptroller) proposes an amendment to §9.415, concerning applications for property tax exemptions. The comptroller is not required by statute to prescribe the forms previously adopted by reference by this rule and this amendment deletes reference to the forms.

The rule is being amended to delete the adoption by reference of model forms included in the rule. The amendment to the rule is proposed to remove provisions concerning model forms that are not required by law to be prescribed by the Comptroller of Public Accounts.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in clarifying that the model tax exemption forms listed in this rule are recommended for use by local taxing authorities, but are not mandated forms. The proposed amendment would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the amendment may be submitted to Deborah Cartwright, Director, Property Tax Assistance Division, P.O. Box 13528, Austin, Texas 78711-3528.

The amendment is proposed under Tax Code, §111.002 and §111.0022, which provide the comptroller with the authority to adopt rules for the administration and enforcement of the Tax Code and programs or functions assigned to the comptroller by law.

The amendment does not affect any statute, article, or section of the Tax Code.

§9.415. Applications for Property Tax Exemptions.

(a) With the application for exemption for residence homesteads [~~(Form 50-114)~~], the appraisal office shall:

(1) provide a list of taxing units served by the appraisal district, together with all residential homestead exemptions each offers; or

(2) provide the appraisal district's name and appraisal district's phone number on the form, with an instruction that the property owner may call the appraisal district to determine what homestead exemptions are offered by the property owner's taxing units.

(b) If the chief appraiser learns of the death of a person qualified for over-65 or disabled homestead exemptions (Tax Code, §11.13) and it appears that the person's spouse has acquired ownership of the homestead, the chief appraiser should require the surviving spouse to file a new homestead exemption application. Based on the information provided in the new application, the chief appraiser shall determine whether the surviving spouse qualifies for homestead exemptions, including over-65 or disabled exemptions, and whether the surviving spouse may retain the tax ceiling for school tax purposes established on the homestead by the decedent.

(c) The comptroller may recommend forms for use in the administration of the ad valorem tax. The recommended forms will not be adopted by rule and their use is not mandatory. Recommended forms may contain some items mandated by statute. Statutory mandates must be followed even though use of the recommended form is optional.[~~The model forms in paragraphs (1) - (27) of this subsection are adopted by reference by the Comptroller of Public Accounts. Copies of these forms are available for inspection at the office of the Texas Register or can be obtained from the Comptroller of Public Accounts, Property Tax Division, P.O. Box 13528, Austin, Texas 78711-3528. Copies may also be requested by calling our toll-free number 1-800-252-9121. In Austin, call (512) 305-9999.~~]

[~~(1) Application for Transitional Housing Property Tax Exemption (Form 50-140);~~]

[~~(2) Application for Residence Homesteads (Form 50-114);~~]

[~~(3) Application for Cemetery Exemption (Form 50-120);~~]

[~~(4) Application for Charitable Organizations (Form 50-115);~~]

[~~(5) Application(s) for Charitable Organization Providing Low-Income Housing (Form 50-242 and Form 50-243);~~]

[~~(6) Application for Youth Spiritual, Mental, and Physical Development Organizations (Form 50-118);~~]

[~~(7) Application for Religious Organizations (Form 50-117);~~]

[~~(8) Application for Privately Owned Schools (Form 50-119);~~]

[~~(9) Application for Disabled Veteran's or Survivor's Exemption (Form 50-135);~~]

[~~(10) Application for Miscellaneous Property Tax Exemptions (Form 50-128);~~]

[~~(11) Application for Theater School Property Tax Exemption (Form 50-125);~~]

[~~(12) Application for Historic Sites Property Tax Exemption (Form 50-122);~~]

[~~(13) Application for Goods Exported from Texas (freeport exemption) (Form 50-113);~~]

[~~(14) Application for Solar and Wind-Powered Energy Device Exemption (Form 50-123);~~]

[~~(15) Application for Property Tax Abatement Exemption (Form 50-116);~~]

[~~(16) Application for Stored Offshore Drilling Rig Exemption (Form 50-124);~~]

[~~(17) Application for Dredge Disposal Site Exemption (Form 50-121);~~]

[~~(18) Application for Nonprofit Water Supply or Wastewater Services Corporation (Form 50-214);~~]

[~~(19) Application for Pollution Control Property (Form 50-248);~~]

[~~(20) Application for Cotton Stored in a Warehouse (Form 50-245);~~]

[~~(21) Application(s) for Community Housing Development Organizations Improving Property for Low-Income and Moderate-Income Housing Tax Exemption Previously Exempt in 2003 (Form 50-263 and Form 50-264);~~]

[~~(22) Application for Water Conservation Initiatives Property Tax Exemption (Form 50-270);~~]

[~~(23) Application for Ambulatory Health Care Center Assistance Exemption (Form 50-282);~~]

[~~(24) Application for Raw Cocoa and Green Coffee Held in Harris County (Form 50-297);~~]

[~~(25) Application for Organizations Constructing or Rehabilitating Low-Income Housing for Property Tax Exemption (Form 50-310);~~]

[~~(26) Application For Exemption of Goods-In-Transit (Form 50-758); and~~]

~~[(27) Application For Property Tax Exemption: For Vehicle Used To Produce Income and Personal Non-Income Producing Activities (Form 50-759).]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER H. TAX RECORD REQUIREMENTS

34 TAC §9.3044

The Comptroller of Public Accounts (comptroller) proposes an amendment to §9.3044, concerning appointment of agents for property taxes. Tax Code, §1.111(h) requires the comptroller to prescribe forms for the designation of agents for property taxes.

The rule is being amended to adopt by reference amended form 50-162, for appointment of agent for property taxes and amended form 50-241, for appointment of agent for single-family residential property tax matters. The amendment to the forms is to implement a provision of House Bill 1203, 81st Legislature, 2009, effective June 26, 2009, which states that a form designating an agent cannot be signed by the person being designated as the agent. Reference to forms 50-162-1 and 50-241-1 is amended throughout the rule to correct the form numbers to reflect 50-162 and 50-241.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by improving the administration of local property valuation and taxation. The proposed amendment would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the amendment may be submitted to Deborah Cartwright, Director, Property Tax Assistance Division, P.O. Box 13528, Austin, Texas 78711-3528.

The amendment is proposed under Tax Code, §1.111(h), which authorizes the comptroller to prescribe forms concerning the representation of a property owner by an agent under Tax Code, §1.111.

The amendment implements Tax Code, §1.111, House Bill 1203 adopted in 2009 by the 81st Legislature.

§9.3044. Appointment of Agents for Property Taxes.

(a) Except as provided by subsection (m) of this section, a property owner shall use comptroller form 50-162 [~~50-162-1~~] to designate an agent for property tax matters. For the purposes of this section, the term "property owner" includes a person who claims a legal interest in the property.

(b) All appraisal districts shall prepare and make available copies of comptroller form 50-162 [~~50-162-1~~] for taxpayers to use in designating agents for property tax matters.

(c) The appointment of an agent under subsection (a) of this section is not binding on an appraisal district until the designation form is filed with the district. Unless otherwise authorized as provided by Tax Code, §1.111(b), a person who is required to register as a property tax consultant under Occupations Code, Chapter 1152, may not sign form 50-162 [~~50-162-1~~] or form 50-241 [~~50-241-1~~] on behalf of a property owner. The property owner shall indicate the date the owner appoints the agent on the designation form. If the property owner files forms designating more than one agent to act in the same capacity for the same item of property, the form bearing the later date of appointment revokes the form bearing the earlier date, as of the date the form bearing the later date is filed. If a conflict arises concerning the representation of a property owner based on the owner's designation of an agent on form 50-162 [~~50-162-1~~] and the agent's filing of form 50-163 for account updates, the written authorization provided by form 50-162 [~~50-162-1~~] shall prevail. Nothing in this section is intended to conflict with Tax Code, §1.111(b). An appraisal district shall permit an agent who has been properly authorized to act on behalf of the property owner to represent the owner as provided by the authorization.

(d) Designation of an agent to receive notices or other communications is not effective for any notice or other communication about a property that is mailed before the property owner or agent files written notice that the designation applies to that property.

(e) While the appraisal office may act on the basis of information provided from a variety of sources, including persons who verbally represent that they act on behalf of property owners, an appraisal district or appraisal review board should require that the form required by this section be filed with the appraisal district before taking any action that increases the property owner's tax liability on the basis of information provided by a person who claims to represent the property owner.

(f) For the purposes of the prohibition against designating more than one agent for a single item of property in Tax Code, §1.111(d), an item of property means the property included under a single appraisal district account number. Unless the appraisal district has separately listed an improvement or the property owner presents documentation to the appraisal district showing separate ownership of land and improvements, a property owner may not designate separate agents to represent land and improvements. A property owner may, however, designate different agents to represent him in different capacities on a single item of property or on different aspects of a particular case.

(g) If a property owner directs delivery of tax bills or notices to an agent after the date appraisal records are certified, the chief appraiser, as soon as practicable after the designation is filed, shall notify the affected taxing unit of the property owner's name, the account number of the property, and the name and address of the agent designated for notice.

(h) A property owner is not required to file a written designation of agent for a person who:

(1) acts as a courier for the property owner;

(2) prepares documents in a clerical capacity for the property owner;

(3) is an employee of the owner or of a corporate parent, affiliate, or subsidiary of the owner and is authorized by the owner to represent him;

(4) is an attorney licensed to practice law in the State of Texas and retained by a property owner to represent him before the appraisal district or appraisal review board; or

(5) is a mortgage lender who is authorized by a deed of trust executed by the property owner to pay taxes on the property, provided that the agency is only for the purpose of receiving tax bills from collection offices.

(i) A person who owns property in more than one county may file a reproduction of the original signed appointment form with each appraisal district. If the chief appraiser has reason to question the authenticity of the document, the chief appraiser may require the property owner or the agent to provide the original for inspection.

(j) In this section, the term "agent" means a person authorized to perform one or more of the following activities on behalf of the property owner:

(1) receive confidential information available to the person designating the agent, subject to the provisions of subsection (k) of this section;

(2) negotiate or resolve any disputed tax matters;

(3) receive notices, tax statements, appraisal review board orders, and other communications from appraisal districts, appraisal review boards, and tax offices;

(4) file notices of protest;

(5) present protests before the appraisal review board; or

(6) other action required or permitted of a property owner before the appraisal district, appraisal review board, or tax office.

(k) An agent designated by a property owner or person who claims an interest in a property may not have access to renditions, agricultural use (1) - (d) applications, or confidential sales information filed with or provided to the appraisal office by a person who has a competing claim of an interest in the property and has not designated the agent as his representative.

(l) An agent designated to represent a property owner as required by this section, shall use form 50-163 to provide the appraisal district with information concerning changes, additions, or deletions in the items of properties for which the agent is designated to represent the owner.

(m) A property owner shall use form 50-241 [~~50-241-1~~] to designate an agent for property tax matters related to the owner's single-family residence. All appraisal districts shall prepare and make available to the public copies of comptroller form 50-241 [~~50-241-1~~].

(n) Forms 50-162, 50-241 [~~50-241-1~~], and 50-163 are adopted by reference. Copies of the forms may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711-3528. Copies may also be requested by calling our toll-free number 1-800-252-9121. In Austin, call (512) 305-9999.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 107. MISCELLANEOUS RULES

34 TAC §107.17

The Texas County and District Retirement System proposes new §107.17, concerning the annual allocation of net investment income or loss prescribed in Government Code, §845.315. House Bill 407, as enacted in the 2009 Regular Session of the 81st Legislature, amended Government Code §845.315(a)(5) and authorized the board of trustees to adopt rules to determine the methodology to be used in the annual allocation of a portion of the system's net investment income or loss for each calendar year to the accounts of certain participating subdivisions.

In the usual course of administering the system, the board of trustees is directed by statute, as of December 31 of each year, to make certain allocations that in the aggregate equal the net investment income or loss of the system. The annual allocations include a division of the system's net investment income or loss among various statutorily-mandated funds and accounts, including the accounts of certain participating subdivisions. With respect to that portion of the allocations to be made to certain subdivisions, the changes made by House Bill 407 direct the board to adopt rules to allocate positive or negative amounts to the accounts of those subdivisions.

In accordance with the statutory authority given to the of the board of trustees to adopt rules to prescribe the annual allocation methodology for the accounts of subdivisions, the proposed new rule, §107.17, specifically grants the board of trustees the ability to allocate positive or negative amounts, to the January 1 balances of that year, to the accounts of subdivisions as part of the annual allocation exercise. The amounts so allocated by the board of trustees, together with all of the other statutorily-required allocations, in the aggregate will equal the system's net investment income or loss for that year.

W. James Nabholz, III, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Nabholz has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be the preservation and protection of accrued benefits. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to W. James Nabholz, III, General Counsel, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

The rule is proposed under the Government Code, §845.102, which provides the board of trustees with the authority to adopt rules necessary or desirable for efficient administration of the

system, and Government Code, §845.315 which gives the board of trustees authority to allocate the net investment income or loss for the year.

The Government Code, §845.315, is affected by this proposed rule.

§107.17. Annual Allocation of Net Investment Income or Loss.

In accordance with the allocations prescribed in Government Code §845.315(a), and pursuant to §845.315(a)(5), as of December 31 of each year, the board of trustees shall allocate to the accounts of subdivisions positive or negative amounts as determined by the board of trustees, to the January 1 balances of that year. The allocation rule prescribed by this section shall not apply to the subdivisions described in Government Code §845.315(a)(6) and (b).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 16, 2009.

TRD-200904656
W. James Nabholz, III
General Counsel
Texas County and District Retirement System
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 637-3355

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 60. CONTRACTING TO PROVIDE PROGRAMS OF ALL-INCLUSIVE CARE FOR THE ELDERLY (PACE)

40 TAC §60.12

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §60.12, concerning client eligibility criteria, in Chapter 60, Contracting to Provide Programs of All-Inclusive Care for the Elderly (PACE).

BACKGROUND AND PURPOSE

The purpose of the amendment is to update the reference to criteria an individual must meet for nursing facility care. Currently §60.12 contains references to §19.2409 (relating to General Qualifications for At-Risk Assessments and Medical Necessity Determinations) and §19.2410 (relating to Criteria Specific to a Medical Necessity Determination). These two sections have been repealed. The medical necessity criteria are now found in §19.2401 (relating to General Qualifications for Medical Necessity Determinations). The amendment also updates a reference to Texas Department of Human Services to DADS to reflect changes resulting from agency consolidations in 2004.

SECTION-BY-SECTION SUMMARY

The amendment to §60.12 replaces rule references to §19.2409 and §19.2410 with a reference to §19.2401.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses, because the amendment will not result in any new requirements for providers.

PUBLIC BENEFIT AND COSTS

Barry Waller, DADS Assistant Commissioner for Provider Services, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendments is that the DADS rule base will accurately reflect cross-references regarding eligibility criteria for the PACE program and update the state agency name to reflect changes resulting from the consolidation of health and human services agencies in 2004.

Mr. Waller anticipates that there will not be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Carolyn Pou at (512) 438-2489 in DADS' Provider Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-8R039, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st Street, Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 8R039" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules

governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§60.12. Client Eligibility Criteria.

(a) To be eligible for participation the applicant must:

(1) be 55 years old or older;

(2) meet the medical necessity criteria for nursing facility care in accordance with §19.2401 of this title [~~§19.2409~~] (relating to General Qualifications for [~~At-Risk Assessments and~~] Medical Necessity Determinations) [~~and §19.2410 of this title (relating to Criteria Specific to a Medical Necessity Determination)~~];

(3) live in a Programs of All-Inclusive Care for the Elderly (PACE) service area; and

(4) be determined by the PACE Interdisciplinary Team (IDT) as able to be safely served in the community.

(b) To be eligible for Medicaid capitated payment the applicant must be eligible for full Medicaid benefits through one of the following methods:

(1) be eligible for Supplemental Security Income (SSI) benefits;

(2) have been eligible for and received SSI benefits, and continue to be eligible for Medicaid as a result of coverage mandated by federal law; or

(3) be eligible for Medicaid benefits, if institutionalized.

(c) To obtain and maintain eligibility, the client must agree to accept the provider agency and its contractors as the client's only service provider.

(d) If the provider agency denies enrollment because the IDT determines that the applicant cannot be served safely in the community, the agency must:

(1) notify the applicant in writing of the reason for the denial;

(2) refer the individual to alternative services, as appropriate;

(3) maintain supporting documentation for the denial; and

(4) notify the Centers for Medicare and Medicaid Services and the Department of Aging and Disability Services [~~the Texas Department of Human Services~~] of the denial and make the supporting documentation available for review.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 16, 2009.

TRD-200904657
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 29, 2009
For further information, please call: (512) 438-3734

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.112

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.112, Attendant Compensation Rate Enhancement, under Title 1, Part 15, Chapter 355, Subchapter A. The proposed rules are adopted without changes to the proposed text as published in the July 31, 2009, issue of the *Texas Register* (34 TexReg 4972) and will not be republished.

Background and Justification

This rule establishes the reimbursement methodology for the Attendant Compensation Rate Enhancement. Under this rule, providers in eligible programs may choose to maintain a certain attendant compensation level in return for increased attendant compensation rates. Participating providers failing to meet their spending requirements are subject to a recoupment of all attendant compensation revenues associated with unmet spending goals. Recouped funds are reinvested (paid to) other providers within the same program that have spent more than they were paid for attendant compensation.

HHSC, under its authority and responsibility to administer and implement rates, is updating this rule to:

modify Attendant Compensation Report submittal requirements to use cost reports in place of Attendant Compensation Reports in most situations;

eliminate reinvestment of recouped funds;

describe how spending requirements are determined when more than one enhancement level is in effect during a reporting period;

require that an authorized representative, as designated per the Department of Aging and Disability Services (DADS) Form 2031, sign any request to withdraw from participation in the enhancement program or to reduce a provider's enhancement payment to a lower participation level; and

Formalize procedures for allowing providers with control of multiple contracts to request to aggregate their reports for purposes of determining compliance with spending requirements.

The following is a discussion of the changes noted above.

Cost Reports. Currently the Attendant Compensation Rate Enhancement program mandates that each provider that receives enhanced funds submit an abbreviated enhancement cost report on the state fiscal year (the Attendant Compensation Report) in addition to the full cost report that is submitted on the provider's fiscal year for rate determination purposes. This stand alone Attendant Compensation Report is only necessary for reinvestment and will be eliminated if reinvestment is eliminated. The cost report will be modified to add additional items to accommodate the information necessary to verify compliance with spending requirements. When reinvestment ends, HHSC will allow a transition period of one year in which Attendant Compensation Reports will still be required to be submitted.

Enrollment Levels for Different Reporting Periods. Currently, the required reporting period for Attendant Compensation Reports is the state fiscal year. This reporting period coincides with the effective period of the spending requirements and enrollment levels under the enhancement program. The required reporting period for cost reports is the provider's fiscal year, which is not necessarily the same as the state's fiscal year. As a result, a single cost report can be subject to multiple sets of enrollment levels. If full cost reports are to be used in place of enhancement reports for Attendant Compensation Report purposes, the rule must be amended to describe how enhancement requirements are determined when multiple sets of enrollment levels are in effect during a reporting period. The amendment describes how enrollment levels are determined in such situations.

Elimination of Reinvestment Process. The amount of funds reinvested each year is dependent on the amount of funds recouped for that year and providers are not guaranteed that funds will be available for reinvestment in any given year. The amount of funds recouped and available for reinvestment has declined since the inception of the Attendant Compensation Rate Enhancement because of reforms that were made to the rules for this program that adjust downward the enhancement levels of providers that do not meet their spending requirements.

Over the past three reinvestment years, total attendant compensation reinvestments have ranged between $500,000 and $1.4 million per year. Because of the low levels of reinvested funds, the effort it takes providers to complete the Attendant Compensation Reports, and the effort it takes the state to process these reports and reinvestment payments, it is not cost effective to continue the requirements that providers submit an enhancement cost report in addition to their full cost report and that the state reinvest the recouped funds. Instead of reinvesting these recouped funds, the funds will be returned to the state and the federal Centers for Medicare and Medicaid Services as appropriate.

Provider Withdrawal. Providers participating in the enhancement are currently allowed to withdraw from the enhancement program or lower their enhancement level at any time upon submission of a letter requesting to withdraw. The amendment will

require that the letter requesting to withdraw or lower an enhancement level be signed by an authorized representative, as designated per the Department of Aging and Disability Services (DADS) Form 2031. This change will ensure that the request for withdrawal or reduction of an enhancement level is made by an authorized individual.

Aggregation of Costs. Currently, controlling entities are permitted to request evaluation of spending requirements for all of their controlled entities within a program in the aggregate, but there are no rules defining an entity or control for this purpose. This lack of rules leads to difficulties and confusion in the administration of the aggregation process. The amendment formalizes current administrative procedures, which should result in an increased understanding of the aggregation process and of provider requirements. The amendment should also reduce areas of disagreement between providers and HHSC as to how the aggregation process is applied.

Comments

The 30-day comment period ended August 31, 2009. During this period, HHSC received one comment regarding the proposed amendments to §355.112 from the Texas Association for Home Care. The comment relating to the proposed rule and HHSC's response follows:

General comment: Change the annual cost reporting period from each provider's individual fiscal year to the state's fiscal year to allow funds recouped from providers for failure to meet spending requirements to continue to be reinvested with providers who exceed their spending requirements.

Response: Currently only six percent of community care providers have a fiscal year that matches the state's fiscal year. This change would require 94 percent of the providers to change their reporting period for completing cost reports. Cost reports, which will be used for both rate determination and Attendant Compensation Rate Enhancement purposes, will be more accurate if completed on each provider's fiscal year because providers will not be required to make the mid-year adjustments to their financial records to complete the reports. In addition, requiring providers to complete cost reports on the state's fiscal year rather than their own fiscal years will result in an increased administrative burden on providers than they would otherwise experience under the proposed rule.

Providers have never been guaranteed that funds will be available for reinvestment in any given year since the amount of funds to be reinvested is dependent upon the amount of funds recouped. The amount of funds recouped and available for reinvestment has declined since the inception of the enhancement program because of reforms that were made to the rules for the program that reduce enhancement levels for providers that do not meet their staffing requirements. Because of the low levels of reinvested funds, the effort it would take for providers to complete their cost reports on the state's fiscal year, the extra effort it would take the state to audit cost reports that were not completed on provider's own fiscal years and the effort it takes the state to process reinvestment payments, HHSC has determined that it would not be cost-effective to require providers complete their cost reports based on the state's fiscal year in order to preserve the existing reinvestment feature. HHSC did not change the proposed rule in response to this comment.

The amendment is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021, and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904681
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 8, 2009
Proposal publication date: July 31, 2009
For further information, please call: (512) 424-6900

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SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES

1 TAC §355.308

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.308, Direct Care Staff Rate Component, under Title 1, Part 15, Chapter 355, Subchapter C. The proposed rule is adopted without changes to the proposed text as published in the July 31, 2009, issue of the *Texas Register* (34 TexReg 4979) and will not be republished.

Background and Justification

This rule establishes the reimbursement methodology for the Nursing Facility Direct Care Staff Rate Component rate enhancement. Under this rule, nursing facilities may choose to maintain a certain staffing level in return for increased direct care staff reimbursement rates. Participating facilities failing to meet their staffing and/or spending requirements are subject to a recoupment of all direct care staff revenues associated with unmet staffing and/or spending goals. Currently, recouped funds are reinvested (paid to) other nursing facilities that have exceeded their staffing requirements.

HHSC, under its authority and responsibility to administer and implement rates, is updating this rule to:

modify Staffing and Compensation Report submittal requirements to use cost reports in place of Staffing and Compensation Reports in most situations;

eliminate reinvestment of recouped funds;

allow for release of vendor hold if an acceptable report is not received within 365 days of the due date and all funds associated with participation during the reporting period in question have been recouped by HHSC or its designee;

describe how staffing requirements are determined when minimum required Licensed Vocational Nurse (LVN)-equivalent minutes per resident day of service associated with a Resource Utilization Group III (RUG-III) case mix group or supplemental reimbursement group (e.g., the continuous ventilation add-on group, the less-than-continuous ventilation add-on group and the pe-

diatric tracheotomy add-on group) changes during a reporting period;

describe how enhanced staffing levels are determined in cases where more than one enhanced staffing level is in effect during a reporting period;

require that an authorized representative, as designated per the Department of Aging and Disability Services (DADS) Form 2031, sign any request to withdraw from participation in the enhancement program; and

add commonly owned corporations to the types of controlled entities permitted to aggregate their costs for determination of compliance with spending requirements.

The following is a discussion of the changes noted above.

Cost Reports. Currently, the Nursing Facility Direct Care Staff Rate Component enhancement program (enhancement program) mandates that each provider that receives enhanced funds submit an abbreviated enhancement cost report for the state fiscal year (the Staffing and Compensation Report) in addition to the full cost report that is submitted for the provider's fiscal year for rate determination purposes. This stand-alone Staffing and Compensation Report is only necessary for reinvestment purposes and will be eliminated if the process of reinvestment is eliminated. The cost report will be modified to add additional items to accommodate the information necessary to verify compliance with staffing and spending requirements. After the process of reinvestment ends, HHSC will allow a transition period of one year in which the Staffing and Compensation Reports will still be required to be submitted.

Staffing Requirements for Different Reporting Periods. Currently, the required reporting period for Staffing and Compensation Reports is the state fiscal year. This reporting period coincides with the effective period of the staffing requirements and enrollment levels under the enhancement program. The required reporting period for cost reports is the provider's fiscal year, which is not necessarily the same as the state's fiscal year. As a result, a single cost report can be subject to multiple sets of staffing requirements and enrollment levels. If full cost reports are to be used in place of enhancement reports for Direct Care Staff Rate purposes, the rule must be amended to describe how enhancement requirements are determined when multiple sets of staffing requirements and enrollment levels are in effect during a reporting period. The amendment describes how staffing requirements and enrollment levels are determined in such situations.

Elimination of Reinvestment Process. The amount of funds reinvested each year is dependent on the amount of funds recouped for that year and providers are not guaranteed that funds will be available for reinvestment in any given year. The amount of funds recouped and available for reinvestment has declined since the inception of the enhancement program because of reforms that were made to the rules for this program that adjust downward the enhancement levels of providers that do not meet their staffing requirements.

Over the past three reinvestment years, total nursing facility reinvestments have ranged between $1 million and $3.2 million per year. Because of the low levels of reinvested funds, the effort it takes providers to complete the Staffing and Compensation Reports, and the effort it takes the state to process these reports and reinvestment payments, HHSC has determined it is not cost effective to continue to require that providers submit an enhancement cost report in addition to their full cost report and that the state reinvest the recouped funds. Instead of reinvesting these recouped funds, the funds will be returned to the state and the federal Centers for Medicare and Medicaid Services, as appropriate.

Vendor Hold. Providers who fail to submit an acceptable Staffing and Compensation Report within stated timeframes have their vendor payments held by the state until an acceptable report is submitted. If an acceptable report is not submitted within 60 days of the stated due date, all enhanced funds associated with the report are recouped by the state and if an acceptable report is not submitted within 365 days of the stated due date, the recoupment becomes permanent and the vendor remains on vendor hold. The amendment will allow for the release of the vendor hold after the recoupment becomes permanent.

Provider Withdrawal. Providers participating in the enhancement program are currently allowed to withdraw from the enhancement program at any time upon submission of a letter requesting to withdraw. The amendment will require that the letter requesting to withdraw be signed by an authorized representative, as designated per the Department of Aging and Disability Services (DADS) Form 2031. This change will ensure that the request for withdrawal is made by an authorized individual.

Aggregation of Costs. Currently, providers participating in the enhancement program are allowed to request that all participating nursing facilities controlled by their controlling entity be permitted to aggregate their costs for determination of compliance with spending requirements. The amendment adds commonly owned corporations to the types of controlled entities permitted to aggregate their costs for this purpose. The amendment also makes non-substantive changes to rule language governing aggregation for nursing facilities to make the language consistent with rule language governing aggregation in other programs.

Comments

The 30-day comment period ended August 31, 2009. During this period, HHSC received comments regarding the proposed amendments to §355.308 from three NF providers and the Texas Health Care Association. A summary of the comments relating to the proposed rule and HHSC's responses follows:

General comment: There should be a hold-harmless for all recoupments for the first year under Resource Utilization Groups III (RUG III) case mix classification system.

Response: This comment is not germane to the proposed rule. The purpose of the proposed rule is to modify Staffing and Compensation Report submittal requirements to use cost reports in place of Staffing and Compensation Reports and to eliminate reinvestment of recouped funds; not to address a hold-harmless for recoupments under RUG III. HHSC did not change the proposed rule in response to this comment.

Comment concerning §355.308(f)(2)(A): The requirement that providers will have to complete "Transition Staffing and Compensation Reports" in addition to their annual cost reports will increase the administrative burden on providers rather than decreasing the administrative burden as the agency proposes as a public benefit of the proposed rule. For example, facilities that have a December 31 fiscal year end will be required to complete a transition report, supposedly due on or around February 28 at the same time that providers are busy completing their annual cost report. At a minimum, providers should be given 150 days to file the transition reports.

Response: Transition reports will only be required for those days in calendar years 2009 and 2010 not included in either the 2009 Staffing and Compensation Report or the facility's 2010 cost report and they will be required *in place of* the current Staffing and Compensation Reports, which means there will be no increase in providers' administrative burden during the transition year. There will be a significant decrease in providers' administrative burden after the transition period as they will only be required to complete a single cost report each year rather than both a cost report and a Staffing and Compensation Report as currently required. Transition reports will be due in the fall of calendar year 2010 which is when Staffing and Compensation Reports are currently due. Currently, Staffing and Compensation Reports are due 60 days after the end of the accountability period. Transition reports will also be due 60 days after the end of the accountability period. HHSC did not change the proposed rule in response to this comment.

Comment concerning §355.308(f)(2)(A): Settling a four month time period in the transition report separate from the remaining eight months is neither fair nor justifiable because (1) other providers may not be held to the same four month staffing enhancement "year," and (2) such a short time period will prohibit providers from adjusting spending and staffing patterns in order to avoid potential recoupments. Instead, the agency should utilize a reporting mechanism that will allow for at least twelve months worth of data to be collected (longer if necessary to transition to the state's fiscal year), such that providers are allowed reasonable time within the reporting period to adjust spending and staffing patterns.

Response: Participants in the nursing facility enhancement program should be monitoring compliance with their staffing and spending requirements and making adjustments on an ongoing basis throughout the accountability period. HHSC provides worksheets for providers to use to monitor their compliance on its website at:

http://www.hhsc.state.tx.us/medicaid/programs/rad/NF/

Those participants who are not meeting their staffing or spending requirements at the end of their transition reporting period have the opportunity to award bonuses to their staff to come into compliance in lieu of repaying the unspent funds. In order for a bonus to be allowable, the provider must have had an acceptable bonus policy in place during the reporting period and the bonuses must be paid within 180 days of when they are accrued. Texas Administrative Code requirements pertaining to paying employee bonuses are detailed in Title 1 of the Texas Administrative Code (TAC) §355.103(b)(1)(A)(i). HHSC did not change the proposed rule in response to this comment.

Comment concerning §355.308(j)(1)(G): This proposed rule suggests that weighted average staffing calculations must be performed whenever LVN-equivalent staffing requirements change during a reporting period. Under the current reimbursement methodology, these staffing requirements will change with every rate setting cycle through the standardization of the case mix indices. Although this adjustment might be warranted under a cost based system, it becomes a disruptive influence on the rate and the staffing requirements if the system is not cost based. Instead, the agency should only "normalize" the case mix indices when the rate methodology is fully funded (cost based), negating the complicated weighted average requirement calculation that this rule proposes.

Response: The "normalization" of case mix indices is detailed in 1 TAC §355.307, relating to Reimbursement Setting Methodology, and is not a part of this rule proposal. Because 1 TAC §355.307 requires this normalization, the amendment to §355.308(j)(1)(G) is required to allow HHSC to calculate an accurate staffing requirement for each facility. The calculation is not complicated, it simply requires multiplying the first minimum required LVN equivalent minute value by the days of service provided during the first period, multiplying the second minimum required LVN equivalent minute value by the days of service provided during the second period, summing the products and dividing by the total days of service provided. HHSC did not change the proposed rule in response to this comment.

Comment concerning §355.308(cc): This proposed rule will eliminate reinvestment of recouped enhanced direct care staff rate funds. When the staffing enhancement system was first designed, both agency and nursing facility representatives agreed that it would be bad public policy to allow recouped funds, which had been appropriated by the legislature to nursing facilities, to flow out of the program. For that reason, reinvestment was added to the staffing enhancement system. Further, since providers that exceed their required staffing levels do so for the benefit of the state and at their own expense, the retroactive redistribution mechanism offered recognition of those staffing efforts. The proposed rules, if implemented, would contravene those original efforts towards appropriate public policy.

Response: Providers have never been guaranteed that funds will be available for reinvestment in any given year since the amount of funds to be reinvested is dependent upon the amount of funds recouped. The amount of funds recouped and available for reinvestment has declined since the inception of the enhancement program because of reforms that were made to the rules for the program that reduce enhancement levels for providers that do not meet their staffing requirements. Because of the low levels of reinvested funds, the effort it takes providers to complete the Staffing and Compensation Reports, and the effort it takes the state to process and audit these reports and reinvestment payments, HHSC has determined that it is not cost-effective to continue to require that provider submit the enhancement cost report in addition to their full cost report and that the state reinvest the recouped funds. HHSC did not change the proposed rule in response to this comment.

Comment concerning §355.308(cc): This proposed rule will eliminate reinvestment of recouped enhanced direct care staff rate funds and is bad public policy because of the recent switch from the Texas Index for Level of Effort (TILE) case mix classification system of reimbursement (eleven levels of care) to the RUG III system (thirty-four levels of care). The updated staffing assumptions built into the new system, and the fact that resident assessments will be performed and submitted twice as often as before (causing staffing requirements to fluctuate more frequently), will cause recoupments to increase dramatically as providers struggle to adjust to the new system. To assume that this type of upheaval will settle within one year, as the proposed rules eliminating the reinvestment feature suggest, is unrealistic. HHSC should work with providers to arrive at a solution for keeping future recouped funds in the nursing home program. If no solution can be found, the implementation of the proposed rules should be postponed for one or two years or until the turbulence caused by the RUG III transition has settled.

Response: Providers will have a full year of experience under the RUG III system before reinvestment is eliminated. HHSC

expects providers to make adjustments during that year to ensure that Medicaid funds intended for direct care are used for direct care. Worksheets are provided on the HHSC website for providers to use in monitoring their compliance with their direct care staffing and spending requirements and free trainings are provided annually to help providers complete and interpret these worksheets accurately. HHSC did not change the proposed rule in response to this comment.

The amendment is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021, and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904682
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 8, 2009
Proposal publication date: July 31, 2009
For further information, please call: (512) 424-6900

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SUBCHAPTER M. MISCELLANEOUS MEDICAID PROGRAMS
DIVISION 4. YOUTH EMPOWERMENT SERVICES WAIVER PROGRAM

1 TAC §355.9060

The Health and Human Services Commission (HHSC) adopts new §355.9060, Reimbursement Methodology for the Youth Empowerment Services Waiver Program, in its Reimbursement Rates Chapter. The new rule is adopted without changes to the proposed text as published in the August 14, 2009, issue of the *Texas Register* (34 TexReg 5456) and will not be republished.

Background and Justification

HHSC, under its authority and responsibility to administer and implement rates, is adopting §355.9060 to establish the reimbursement methodology for the Youth Empowerment Services (YES) Waiver Program

Comments

The 30-day comment period ended September 14, 2009. During this period, HHSC received no comments regarding the rule.

Statutory Authority

The new rule is adopted under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904683
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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Proposal publication date: August 14, 2009
For further information, please call: (512) 424-6900

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TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 25. PREPAID FUNERAL CONTRACTS
SUBCHAPTER B. REGULATION OF LICENSES

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts the repeal of §25.17, concerning the Guaranty Fund; §25.18, concerning Definitions Applicable to §25.19 and §25.20; §25.19, concerning Notice of Seizure; the Bid Process; and §25.20, concerning Guaranty Fund Claims Filing Procedures and Eligibility for Payment Standards; and simultaneously adopts new §25.17, concerning the Guaranty Fund; §25.18, concerning Cancelled Permits; and §25.19, concerning Guaranty Fund Claims. New §25.17 is adopted with changes to the text as published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6005). Repealed §§25.17 - 25.20 and new §25.18 and §25.19 are adopted without changes and will not be republished.

The change made to the proposed rules appears in §25.17(c) where the word "and" was changed to "or" in the last sentence to clarify that a seller's calculated assessment shall be remitted with either the Renewal filing or the Annual Report filing.

These repealed and new rules update and conform the rules related to the Prepaid Funeral Guaranty Fund (the Fund) to new statutory provisions.

House Bill (HB) 3762, adopted by the 81st Texas Legislature in 2009, amended Subchapter H of Chapter 154 of the Finance Code to expand the Fund to cover insurance-funded prepaid funeral benefits contracts. The purpose of the Fund is to guarantee performance of covered prepaid funeral benefits contracts (contracts). Previously, the Fund applied only to trust-funded contracts. The new statutory provisions authorize the Fund to

maintain separate accounts for trust-funded contract claims and insurance-funded contract claims. The new statutory provisions also expand the membership of the advisory council that supervises the operation and maintenance of the Fund and clarifies eligible claimants and uses of the Fund.

New §25.17 confirms the creation of the Fund and reestablishes the two-year terms of the appointed Guaranty Fund Advisory Council members. Assessments are expanded to apply to all sellers of prepaid funeral benefits rather than only trust-funded sellers and are to be paid with the seller's Renewal or Annual Report filing. Sellers of insurance-funded contracts will be assessed $1 per contract until the insurance-funded account reaches $1 million to create a fund that will guarantee the performance of insurance-funded contracts similar to the already existing fund that guarantees the performance of trust-funded contracts. The new rule permits reimbursement from the fund for travel expenses incurred by the appointed members of the Guaranty Fund Advisory Council, which is required to meet at least once per year.

New §25.18 describes the process for selecting a person or entity to assume responsibilities when a permit to sell prepaid funeral benefits is cancelled. New §25.18(a) requires the department to notify the parties to contracts sold by a cancelled permit holder of the cancellation within 30 days. New §25.18(b) establishes an expanded bid list of those who wish to assume a cancelled permit holder's rights and obligations or who wish to provide administrative and record keeping services related to the cancelled permit holder's outstanding contracts. This expansion of the bid list facilitates the new uses of the Fund allowed by HB 3762.

New §25.18(c) requires the department to notify all persons and entities on the bid list of a permit cancellation within 60 days. In addition, all permit holders in the vicinity of the cancelled permit holder will be notified of the cancellation to provide them with the opportunity to bid on the right to assume the cancelled permit holder's obligations. If the cancelled permit is a trust-funded permit, funeral providers in the vicinity of the cancelled permit holder will also be notified. The new rule sets out required content for the notice.

New §25.18(d) sets out facts that the commissioner is to consider in selecting a successor permit holder or a provider of administrative and record keeping services. Under new §25.18(e), the commissioner is responsible for the selection of the successful bidder, but the Guaranty Fund Advisory Council must approve any contract that obligates a payment from the Fund.

In the event all bids are rejected, new §25.18(f) and (g) provide for new bid solicitation or continued management of the outstanding contracts by the department. If the cancelled permit was trust-funded, the balance of funds paid or to be paid on the contracts of the cancelled permit holder must be placed in the Fund if no successor permit holder is found. Further, new §25.18(h) allows the department to employ persons to assist with the bid solicitation and selection process.

New §25.19 addresses claims against the Fund. Section 25.19(a) enumerates claims that are not eligible for payment from the Fund for jurisdictional reasons. Ineligible claims include claims based on events or losses that occurred prior to the establishment of the Fund for guarantee of performance of the type of contract involved. For example, claims based on a trust-funded contract purchased before the creation of the Fund in 1987 and claims based on insurance-funded contract losses that occurred before the effective date of HB 3762 are ineligible for payments. The Fund does not cover claims for contracts purchased from unauthorized sellers.

New §25.19(b) sets out what a claimant must file with the department to establish a claim against the Fund. New §25.19(c) allows the Guaranty Fund Advisory Council to delegate to the commissioner authority to settle and determine claims against the Fund. Subsection (c) also provides that claimants may ask the Guaranty Fund Advisory Council to review a determination made by the commissioner on a claim against the Fund within 30 days of receipt of notice of the determination. After review, the Guaranty Fund Advisory Council may revise the commissioner's determination.

The Department received no comments regarding the proposed repeal and new rules.

7 TAC §§25.17 - 25.20

The repeal is adopted under Finance Code, §154.051, which authorizes the Finance Commission to adopt reasonable rules relating to the enforcement and administration of Chapter 154; Finance Code §154.111, which authorizes the Finance Commission to adopt rules governing the selection of successor permit holders for the sell of prepaid funeral benefits; and Finance Code §154.351, which allows the Finance Commission to by rule establish and the department to maintain a fund to guarantee performance by sellers of prepaid funeral benefits contracts of their obligations to the purchasers.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2009.

TRD-200904659
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: November 5, 2009
Proposal publication date: September 4, 2009
For further information, please call: (512) 475-1300

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7 TAC §§25.17 - 25.19

The new sections are adopted under Finance Code, §154.051, which authorizes the Finance Commission to adopt reasonable rules relating to the enforcement and administration of Chapter 154; Finance Code §154.111, which authorizes the Finance Commission to adopt rules governing the selection of successor permit holders for the sell of prepaid funeral benefits; and Finance Code §154.351, which allows the Finance Commission to by rule establish and the department to maintain a fund to guarantee performance by sellers of prepaid funeral benefits contracts of their obligations to the purchasers.

§25.17. Guaranty Fund.

(a) Fund established. Pursuant to Finance Code Chapter 154, Subchapter H, a guaranty fund is established to guarantee performance by sellers of prepaid funeral services. The fund is named the Prepaid Funeral Guaranty Fund, and is supervised by an advisory council composed of members as set out in Finance Code §154.355.

(b) Advisory Council. The advisory council is named the Guaranty Fund Advisory Council. The consumer representative and the insurance-funded industry representative serve a two-year term beginning on January 1 of an even-numbered year and ending December 31 of the following odd-numbered year. The trust-funded industry representative serves a two-year term beginning on January 1 of an odd-numbered year and ending December 31 of the following even-numbered year. The banking commissioner or the commissioner's official designee serves as the chairperson of the council.

(c) Assessments. The department shall make and collect assessments from all sellers of prepaid funeral benefits pursuant to Finance Code Chapter 154, Subchapter H. Each seller shall remit the amount of its calculated assessment to the department each year with its Renewal or Annual Report filing.

(d) Expenses. The commissioner may use any earnings from the Prepaid Funeral Guaranty Fund for reimbursement of travel expenses incurred by the industry and the consumer representatives of the Guaranty Fund Advisory Council pursuant to the travel guidelines applicable to state employees, and for the expenses of providing any other legislatively mandated action with respect to the Prepaid Funeral Guaranty Fund, including but not limited to audits.

(e) Meetings. The Guaranty Fund Advisory Council shall meet on a periodic basis as determined by the commissioner in order to fulfill the requirements of supervising the operation and maintenance of the Prepaid Funeral Guaranty Fund. However, in no event shall the advisory council fail to meet at least once annually.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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General Counsel
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7 TAC §25.23

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts amendments to §25.23, concerning application and renewal fees, without changes to the proposed text as published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6008).

Section 25.23 establishes the application and renewal fees a person must pay to the department to obtain and maintain a license to sell prepaid funeral benefits contracts (prepaid contracts) under Finance Code, Chapter 154. The amendments to the rule make it consistent with new provisions in Finance Code, Chapter 154.

Previously, §25.23(b)(3) allowed a permit holder to request a one-year reduction in its renewal fee if it could demonstrate that it was temporarily insolvent or if payment of the full renewal fee would cause it to become temporarily insolvent and the permit holder reasonably expected to be able to pay the full renewal fee in three years.

House Bill (HB) 3762, 81st Texas Legislature, 2009, added a provision to Finance Code §154.109(b) that allows the commissioner to deny renewal of a permit if the permit holder's financial condition does not warrant the public's confidence. The addition of this new criteria for renewal of a permit to sell prepaid funeral benefits contracts conflicts with the previous provisions of §25.23(b)(3), which allowed renewal of a permit even if the permit holder was in an insolvent condition. Therefore, §25.23(b)(3) is deleted to eliminate the inconsistency.

Deletion of §25.23(b)(3) eliminates the need for the definition of "financially insolvent" contained in §25.23(a)(2); therefore, that definition has been deleted.

This amendment makes §25.23 consistent with the new provisions of the Finance Code.

The Department received no comments regarding the proposed amendments.

The amendments are adopted pursuant to Finance Code, §154.051, which allows the Finance Commission to adopt reasonable rules relating to the enforcement and administration of Chapter 154; and §154.109, which establishes reasons for cancellation, suspension, or non-renewal of a permit to sale prepaid funeral benefits contracts.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200904661
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PART 4. TEXAS DEPARTMENT OF SAVINGS AND MORTGAGE LENDING

CHAPTER 80. MORTGAGE BROKER AND LOAN OFFICER LICENSING

The Finance Commission of Texas (Finance Commission) adopts the amendments to the following sections of 7 TAC Chapter 80, Mortgage Broker and Loan Officer Licensing: §80.1, Scope; §80.2, Definitions; §80.3, Licensing - General; §80.4, Qualifications for Obtaining Licenses; §80.5, Renewals; §80.6, Sponsorship and Termination Thereof; §80.7, Background Checks; §80.12, Display of License Verification; License Record Changes; §80.13, Books and Records; §80.15, Complaints, Administrative Penalties, and Disciplinary and/or Enforcement Actions; and §80.20, Inspections. The amendments to the sections are adopted without changes to the proposed text as published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6009).

These amendments are adopted in order to implement the provisions of House Bill (HB) 963 and HB 2774 as passed by the 81st Texas Legislature, as well as a previous legislative session change to Chapter 55, Texas Occupations Code. These bills make substantial modifications to the Mortgage Broker License Act, Finance Code, Chapter 156 relating to the licensing and regulation of mortgage brokers.

The amendment to §80.1, concerning Scope, reflects the departments intention to participate in the Nationwide Mortgage Licensing System and Registry (NMLSR) as required by the federally mandated Secure and Fair Enforcement Licensing Act of 2008 (SAFE), and enacted by HB 10 in Texas. In addition, the amendment expands the definition for the mortgage banker exemption to state that to be exempt the mortgage banker must be registered or licensed under Chapter 157, Finance Code.

The amendment to §80.2, concerning Definitions, adds the more familiar acronyms associated with the quasi-federal government sponsored enterprises which are Fannie Mae, Freddie Mac, and Ginnie Mae.

The amendment to §80.3, concerning Licensing - General, eliminates the requirement for a holder of a provisional license to display the license.

The amendment to §80.4, concerning Qualifications for Obtaining Licenses, updates the references to insurance agent titles as defined by the Texas Insurance Code. It also amends the requirements for a mortgage broker and an entity mortgage broker license by indicating finance requirements are met solely by participation in the Mortgage Broker Recovery Fund, and allows an active mortgage broker license holder to convert to a loan officer license without additional pre-licensing education or proof of experience.

The amendment to §80.5, concerning Renewals, adds language pursuant to Chapter 57, Texas Education Code, that a licensing agency cannot renew a license if the licensee is in default on a student loan administered by the Texas Guaranteed Student Loan Corporation. In addition, the amendment adds language pursuant to Chapter 55, Texas Occupations Code, which exempts licensees on active military duty from late filing penalties and allows additional time to complete continuing education requirements.

The amendment to §80.6, concerning Sponsorship and Termination Thereof, eliminates the requirement of a loan officer's sponsoring mortgage broker to display the license.

The amendment to §80.7, concerning Background Checks, implements HB 963 which amended Chapter 55, Texas Occupations Code, by providing a means for a potential applicant to request a determination of eligibility relating to the effect a criminal history may have on the approval of a mortgage broker or loan officer license.

The amendment to §80.12, concerning Display of License Verification; License Record Changes, changes the title of the section and references to the display of license verifications.

The amendment to §80.13, concerning Books and Records, eliminates the language that requires the mortgage broker to maintain records relating to the maintenance of any surety bond; the requirement for a surety bond has been eliminated by the enactment of HB 2774.

The amendment to §80.15, concerning Complaints, Administrative Penalties, and Disciplinary and/or Enforcement Actions, changes the language to include the addition of an administration claim as a method to receive payment from the Mortgage Broker Recovery Fund; adds language to indicate the commissioner may collect a fee for the handling of a returned check or credit card charge back; clarifies that a licensee receives a notice and opportunity for hearing regarding the imposition of administrative penalties; and eliminates language that states any penalty collected must be deposited in the Mortgage Broker Recovery Fund. In addition it adds language that the commissioner may order disciplinary action against a license holder if he becomes aware of any fact that had it been known prior to the issuance of a license it may have resulted in the denial of a license.

The amendment to §80.20, concerning Inspections, adds language that the commissioner may requirement reimbursement for a mortgage broker examination if the records are located out of state or if the review is considered beyond the routine examination process.

No comments were received regarding the amendments to the sections.

SUBCHAPTER A. LICENSING

7 TAC §§80.1 - 80.7

The amendments are adopted under Finance Code §11.306, which authorizes the Finance Commission to adopt mortgage broker rules as provided by Chapter 156 of the Act, and under Finance Code, §156.102(a) and (b), which authorize the Commissioner of the Texas Department of Savings and Mortgage Lending, subject to review and compliance with the directives of the Finance Commission, to adopt and enforce rules necessary for the intent of or to ensure compliance with the Act.

The section of the Act affected by the amendments is Finance Code, §156.102(a) relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The amendments relate to the following sections of the Finance Code: §§156.203, 156.204, 156.205, 156.208, 156.212, 156.301, 156.302, 156.303, and 156.506.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904745
Caroline Jones
General Counsel
Texas Department of Savings and Mortgage Lending
Effective date: November 8, 2009
Proposal publication date: September 4, 2009
For further information, please call: (512) 475-1352

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SUBCHAPTER C. ADMINISTRATION AND RECORDS

7 TAC §80.12, §80.13

The amendments are adopted under Finance Code §11.306, which authorizes the Finance Commission to adopt mortgage broker rules as provided by Chapter 156 of the Act, and under Finance Code, §156.102(a) and (b), which authorize the Com-

missioner of the Texas Department of Savings and Mortgage Lending, subject to review and compliance with the directives of the Finance Commission, to adopt and enforce rules necessary for the intent of or to ensure compliance with the Act.

The section of the Act affected by the amendments is Finance Code, §156.102(a) relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The amendments relate to the following sections of the Finance Code: §§156.203, 156.204, 156.205, 156.208, 156.212, 156.301, 156.302, 156.303, and 156.506.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Caroline Jones
General Counsel
Texas Department of Savings and Mortgage Lending
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For further information, please call: (512) 475-1352

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SUBCHAPTER D. COMPLAINTS AND INVESTIGATIONS

7 TAC §80.15

The amendments are adopted under Finance Code §11.306, which authorizes the Finance Commission to adopt mortgage broker rules as provided by Chapter 156 of the Act, and under Finance Code, §156.102(a) and (b), which authorize the Commissioner of the Texas Department of Savings and Mortgage Lending, subject to review and compliance with the directives of the Finance Commission, to adopt and enforce rules necessary for the intent of or to ensure compliance with the Act.

The section of the Act affected by the amendments is Finance Code, §156.102(a) relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The proposed amendments relate to the following sections of the Finance Code: §§156.203, 156.204, 156.205, 156.208, 156.212, 156.301, 156.302, 156.303, and 156.506.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Caroline Jones
General Counsel
Texas Department of Savings and Mortgage Lending
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For further information, please call: (512) 475-1352

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SUBCHAPTER I. INSPECTIONS AND INVESTIGATIONS

7 TAC §80.20

The amendments are adopted under Finance Code §11.306, which authorizes the Finance Commission to adopt mortgage broker rules as provided by Chapter 156 of the Act, and under Finance Code, §156.102(a) and (b), which authorize the Commissioner of the Texas Department of Savings and Mortgage Lending, subject to review and compliance with the directives of the Finance Commission, to adopt and enforce rules necessary for the intent of or to ensure compliance with the Act.

The section of the Act affected by the amendments is Finance Code, §156.102(a) relating to authority for the Finance Commission to adopt rules to implement the intended purpose of the Act or to enforce the Act. The amendments relate to the following sections of the Finance Code: §§156.203, 156.204, 156.205, 156.208, 156.212, 156.301, 156.302, 156.303, and 156.506.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200904757
Caroline Jones
General Counsel
Texas Department of Savings and Mortgage Lending
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Proposal publication date: September 4, 2009
For further information, please call: (512) 475-1352

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PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 82. ADMINISTRATION

7 TAC §82.3

The Finance Commission of Texas (commission) adopts new 7 TAC §82.3, concerning Request for Criminal History Evaluation Letter, without changes from the proposal published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6019).

The purpose of the new rule is to implement House Bill 963 (HB 963) as enacted by the 81st Texas Legislature during the 2009 session. HB 963 adds Subchapter D to Chapter 53 of the Texas Occupations Code. The new subchapter provides procedures for persons to obtain preliminary information regarding their eligibility for certain occupational licenses before they begin a training program for that occupation. In particular, HB 963 adds §53.105, which allows a licensing authority to charge a fee to a person requesting a criminal history evaluation letter.

Section 82.3(a) outlines the purpose of the rule, which is to provide the procedures for a person considering applying for a license to request a criminal history evaluation letter under Texas

Occupations Code, Chapter 53, Subchapter D. Subsection (a) also adopts the definitions used in §82.2.

Section 82.3(b) delineates the applicability of this rule to all persons, including business entities, considering applying for a license with the Office of Consumer Credit Commissioner under Title 4 of the Texas Finance Code. The new rule also applies to any other licensed business, occupation, or profession requiring a criminal history evaluation assigned to the regulatory authority of the agency under other law.

Section 82.3(c) lists the required information that must be submitted by the requestor to the agency.

Section 82.3(d) explains that business entities must provide the required information for every individual who would qualify as a principal party if the entity were applying for a license.

Section 82.3(e) sets the processing fees of $75 for each entity requestor plus $40 for fingerprint processing for each individual or principal party included in the criminal history evaluation letter request.

Section 82.3(f) provides that upon completion of the agency's investigation, the agency will notify the requestor of the agency's determination within 90 days of the requestor satisfying all of the agency's requests for information to complete the criminal history evaluation letter request.

The commission received no written comments on the proposal.

The new rule is adopted under Texas Occupations Code, §53.105, as enacted by HB 963 (Acts 2009, 81st Leg.), which authorizes a licensing authority to charge a person requesting an evaluation letter a fee sufficient to cover the costs of administration. The rule is also adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Chapter 14 and Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §14.157 authorizes the commission to adopt rules governing the custody and use of criminal history record information obtained under Texas Finance Code, Chapter 14, Subchapter D.

The statutory provisions affected by the new rule are contained in Texas Finance Code, Chapter 14 and Title 4.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2009.

TRD-200904671
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: November 5, 2009
Proposal publication date: September 4, 2009
For further information, please call: (512) 936-7621

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CHAPTER 84. MOTOR VEHICLE INSTALLMENT SALES

SUBCHAPTER A. GENERAL PROVISIONS

7 TAC §84.102

The Finance Commission of Texas (commission) adopts amendments to 7 TAC §84.102, concerning Definitions, relating to the regulation of motor vehicle retail installment sales. The commission adopts the amendments to §84.102 with changes to the proposal published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6021).

The commission received one written comment on the proposal from the Texas Automobile Dealers Association. The official comment centers around one issue that has remained outstanding since the agency addressed precomments (received prior to publication) and informal comments received since the proposal. The comment is addressed following the purpose paragraphs.

The purpose of these amendments is to implement recent legislation enacted by the 81st Texas Legislature affecting the regulation of motor vehicle retail installment sales, including the following bills: Senate Bill (SB) 1965 (commercial vehicles) and SB 1966 (debt cancellation agreements). The following paragraphs provide a general introduction regarding each legislative bill.

During the 2009 legislative session, the Texas Legislature passed SB 1965 relating to the regulation of retail installment sales contracts for commercial vehicles. Certain provisions within Chapter 348 of the Texas Finance Code are not applicable to transactions involving commercial vehicles. Furthermore, these consumer-oriented provisions prevent commercial buyers from contracting for services related to commercial uses that would not be relevant to a consumer purchase. The intent of SB 1965 is to exempt retail installment sales contracts for commercial vehicles from certain provisions of the Texas Finance Code.

Debt cancellation agreements were authorized to be offered as part of consumer loans in 2003, but at that time the legislature did not address the sale of these products with regard to motor vehicle retail installment sales. With the enactment of SB 1966, the 81st Texas Legislature amended the Texas Finance Code to allow the sale of debt cancellation agreements in connection with Chapter 348 retail installment sales contracts, with certain limitations and restrictions. Specifically, the Texas Legislature added §348.124 to the Texas Finance Code and amended §348.001 (adding a definition of "debt cancellation agreement"), §348.005 (authorizing a fee for debt cancellation agreements as an itemized charge), and §348.208 (conforming changes).

In order to properly implement the changes made by SB 1965, as well as certain applicability issues contained in SB 1966, the amendments to §84.102 add definitions for "commercial vehicle" and "ordinary vehicle" to be used throughout 7 TAC Chapter 84. Additionally, the existing definitions following the two new additions are being renumbered accordingly.

The commenter requests "the agency to substitute the term *non-commercial vehicle* in lieu of the term 'ordinary vehicle' throughout its proposals published in the September 4, 2009, *Texas Register* and specifically as proposed in 7 TAC §84.102(12)." (emphasis in original). The commenter further states that "the description of a non-commercial vehicle as 'ordinary' is not as descriptive as 'non-commercial vehicle' " and that "the use of the term 'ordinary' bears a connotation that a vehicle is mediocre instead of the intended definition that the vehicle is for personal, family, or household use." (footnote omitted).

The use of the term "ordinary vehicle" has been engrained in the motor vehicle installment sales regulations for more than nine years. Furthermore, after the passage of the plain language statutory requirements in 2001, the plain language rules and forms were modeled after the existing regulations,

hence incorporating the "ordinary vehicle" terminology. In the development of the plain language contracts during the early 2000s, it was thought that utilizing "ordinary vehicle" would bear a more striking contrast to "commercial" and "heavy commercial" vehicles. In addition to the model clauses in §84.808, the term "ordinary vehicle" has also been employed with regard to default charges in §84.202. Moreover, the commission's published rules regarding debt cancellation agreements (§§84.301, 84.302, and 84.308) also utilize this term as a helpful distinction from commercial vehicles that is also consistent with the terminology in current regulations. The commission disagrees with the commenter's suggested connotation regarding "ordinary vehicle" and believes it to be an appropriate descriptor for the transactions to which it applies. Thus, the commission declines the commenter's substitute term and maintains the use of "ordinary vehicle" for this adoption.

Regarding statutory authority from recent legislation for particular provisions, the amendments concerning ordinary vehicles are adopted under Texas Finance Code, §348.0015, as enacted by SB 1965 (Acts 2009, 81st Leg.), which authorizes the commission to determine by rule a motor vehicle that is of a type typically used for personal, family, or household use.

In reference to all of the amendments, they are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

§84.102. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Accrual method--A method to compute a finance charge and apply the finance charge to the unpaid principal balance. Both the true daily earnings method and the scheduled installment earnings method are accrual methods.

(2) Add-on method--A method for calculating a precomputed time price differential charge in which the retail buyer agrees to pay the total of payments. The total of payments includes both the principal balance of the contract and the time price differential charge. The add-on time price differential charge is calculated at the inception of the contract on the principal balance for the full term, as if the principal balance of the contract did not decline over the term of the contract.

(3) Commercial vehicle--A motor vehicle that is not used primarily for personal, family, or household use and has the same meaning as defined by Texas Finance Code, §348.001(a-1).

(4) Contract rate--The annual time price differential rate that may be stated in a retail installment sales contract, and that accrues or is assessed against the principal balance that is subject to a finance charge for the term of the contract. The contract rate cannot exceed the daily rate converted to an annualized rate.

(5) Creditor--The seller or any subsequent holder or assignee of the retail installment sales contract.

(6) Daily rate--The rate authorized under Texas Finance Code, §348.105, or the simple rate equivalent of the rate applicable to the contract under Texas Finance Code, §348.104, computed on a daily basis using a 365-day calendar year.

(7) Default charge or late charge--The additional charge for a late payment on a contract.

(8) Deferment charge--The payment of an additional charge to defer the payment date of a scheduled payment on a contract.

(9) Holder--Holder includes retail sellers as well as any person who subsequently purchases, acquires, or otherwise receives the retail installment sales contract. All holders are creditors.

(10) Irregular payment contract--A contract:

(A) that is payable in installments that are not consecutive, monthly, and substantially equal in amount; or

(B) the first scheduled installment of which is due later than one month and 15 days after the date of the contract.

(11) Licensee--Any person who has been issued a motor vehicle sales finance license pursuant to Texas Finance Code, Chapter 348.

(12) Ordinary vehicle--A motor vehicle that is used primarily for personal, family, or household use.

(13) Principal balance subject to finance charge--The principal balance used in the determination or calculation of the time price differential charge.

(A) Sales tax advanced transaction--In a sales tax advanced transaction, the principal balance subject to a finance charge is computed by:

(i) adding:

(I) the cash price of the vehicle;

(II) the amount of the authorized itemized charges;

(III) sales tax;

(IV) an authorized and properly disclosed documentary fee;

(V) an amount authorized under Texas Finance Code, §348.404(b); and

(ii) subtracting from the results under clause (i) of this subparagraph the amount of the retail buyer's down payment in money, goods, or both.

(B) Sales tax deferred transaction--In a sales tax deferred transaction, the principal balance subject to a finance charge does not include the deferred sales tax. The principal balance subject to a finance charge is computed by:

(i) adding:

(I) the cash price of the vehicle (excluding sales tax);

(II) the amount of the authorized itemized charges (excluding sales tax);

(III) an authorized and properly disclosed documentary fee;

(IV) an amount authorized under Texas Finance Code, §348.404(b); and

(ii) subtracting from the results under clause (i) of this subparagraph the amount of the retail buyer's down payment in money, goods, or both.

(14) Regular payment contract--Any contract that is not an irregular payment contract.

(15) Scheduled installment earnings method--The scheduled installment earnings method is a method to compute the finance charge by applying a daily rate to the unpaid principal balance as if each payment will be made on its scheduled installment date. A payment received before or after the due date does not affect the amount of the scheduled reduction in the unpaid principal balance. Under this method, a finance charge refund is calculated by deducting the earned finance charges from the total finance charges. If prepayment in full or demand for payment in full occurs between payment due dates, a daily rate equal to 1/365th of the annual rate is multiplied by the unpaid principal balance. The result is then multiplied by the actual number of days from the date of the previous scheduled installment through the date of prepayment or demand for payment in full to determine earned finance charges for the abbreviated period. In addition to the earned finance charges calculated in this paragraph, the creditor may also earn a $150 acquisition fee for a heavy commercial vehicle, or a $25 fee for other vehicles, so long as the total of the earned finance charges and the acquisition fee do not exceed the finance charge disclosed in the contract. The creditor is not required to refund unearned finance charges if the refund is less than $1.00. The scheduled installment earnings method may be used with either an irregular payment contract or a regular payment contract. The computation of finance charges must comply with the U.S. rule as defined in Appendix J of 12 C.F.R. Part 226 (Regulation Z).

(16) Sales tax advanced transaction--A retail installment sales transaction in which a retail seller remits the entire amount of the sales tax to the appropriate taxing authority within 20 working days of the sale.

(17) Sales tax deferred transaction--A retail installment sales transaction in which a retail seller or a qualified related finance company collects sales tax from the retail buyer and remits the tax under Tax Code, §152.047 to the Comptroller of Public Accounts.

(18) Seller--The seller of the motor vehicle. This term is synonymous with the term "retail seller."

(19) Sum of the periodic balances method (Rule of 78s).

(A) Under this method, the finance charge refund is calculated as follows:

(i) Subtract an acquisition fee not greater than $150 for a heavy commercial vehicle, or $25 for other vehicles, from the total finance charge.

(ii) Multiply the amount computed in clause (i) of this subparagraph by the refund percentage computed below. The result is the finance charge refund.

(iii) Compute the refund percentage by:

(I) Computing the sum of the unpaid monthly balances under the contract's schedule of payments beginning:

(-a-) On the first day, after the date of the prepayment or demand for payment in full; that is, the date of a month that corresponds to the date of the month that the first installment is due under the contract; or

(-b-) If the prepayment or demand for payment in full is made before the first installment date under the contract, one month after the date of the second scheduled payment of the contract occurring after the prepayment or demand;

(II) Dividing the result in subclause (I) of this clause by the sum of all of the monthly balances under the contract's schedule of payments.

(B) As an alternative for heavy commercial vehicles, as defined in the Texas Finance Code, the sum of the periodic balances method may be computed as follows:

(i) Multiply the total finance charge by a refund percentage determined as follows:

(I) Compute the sum of the unpaid monthly balances under the contract's schedule of payments beginning:

(-a-) On the first day, after the date of the prepayment or demand for payment in full; that is, the date of a month that corresponds to the date of the month that the first installment is due under the contract; or

(-b-) If the prepayment or demand for payment in full is made before the first installment date under the contract, one month after the date of the second scheduled payment of the contract occurring after the prepayment or demand;

(II) Divide the result in subclause (I) of this clause by the sum of all of the monthly balances under the contract's schedule of payments.

(ii) From the result derived in clause (i) of this subparagraph, deduct an acquisition fee not to exceed $150.

(C) The creditor is not required to give a finance charge refund if it would be less than $1.00.

(D) The sum of the periodic balances method may not be used with an irregular payment contract.

(20) True daily earnings method--The true daily earnings method is a method to compute the finance charge by applying a daily rate to the unpaid principal balance. The daily rate is 1/365th of the equivalent contract rate. The earned finance charge is computed by multiplying the daily rate of the finance charge by the number of days the actual unpaid principal balance is outstanding. Payments are credited as of the time received; therefore, payments received prior to the scheduled installment date result in a greater reduction of the unpaid principal balance than the scheduled reduction, and payments received after the scheduled installment date result in less than the scheduled reduction of the unpaid principal balance. The computation of finance charges must comply with the U.S. rule as defined in Appendix J of 12 C.F.R. Part 226 (Regulation Z).

(21) U.S. Rule--The ruling of the United States Supreme Court in Story v. Livingston, 38 U.S. (13 Pet.) 359, 371 (1839) that, in partial payments on a debt, each payment is applied first to finance charge and any remainder reduces the principal. Under this rule, accrued but unpaid finance charge cannot be added to the principal and interest cannot be compounded.

(22) Vehicle--A motor vehicle as defined by Texas Finance Code, §348.001(4).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. RETAIL INSTALLMENT CONTRACT

7 TAC §84.201

The Finance Commission of Texas (commission) adopts amendments to 7 TAC §84.201, concerning Time Price Differential, relating to the regulation of motor vehicle retail installment sales. The commission adopts the amendments to §84.201 with changes to the proposal published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6023).

The commission received no written comments on the proposal. However, since the proposal, changes have been made due to informal comments received. An explanation regarding these changes is included following the purpose paragraphs.

The purpose of these amendments is to implement House Bill 2438 (HB 2438) as enacted by the 81st Texas Legislature regarding the disclosure of equity and trade-in information and to make technical corrections.

Due to increasing consumer complaints and legislation considered during the 2007 session, the House Committee on Financial Institutions conducted an interim study regarding motor vehicle installment sales, including two key issues: the financing of negative equity and the retirement of existing debt on a trade-in motor vehicle. Itemization of negative equity under current law has led to confusion among consumers. Concerning the payoff of trade-ins, without an explicit legal requirement for the retail seller to timely pay off trade-in vehicles, late payments and defaults have damaged consumers' credit reports through no fault of their own. With the enactment of HB 2438, the 81st Texas Legislature amended Chapter 348 of the Texas Finance Code in order to address these issues.

The amendments to §84.201 are technical in nature. The changes to §84.201(d)(1)(A), (2)(A), and (3)(A) update the internal references to definitions as renumbered in §84.102 (see separate adoption in this issue of the *Texas Register).* To implement the statutory change enacted by HB 2438 that 16 days now constitutes a month (as opposed to 15 days), the time price differential calculations have been revised in §84.201(d)(2)(B) and (3)(B).

Since the proposal, a correction has been made in two places related to the proper calculation of a month under HB 2438. Informal comments submitted alerted the agency to the remaining existence of the word "halfway" in §84.201(d)(2)(B)(iv)(III) and (3)(B)(iv)(III). As proposed in both respective subclauses (II) contained in these provisions, for this adoption the word "halfway" has been replaced with ".5333" in each subclause (III) to avoid any gap between the round-up level and the round-down level.

Regarding statutory authority from recent legislation for particular provisions, the amendments relating to disclosure of equity and trade-in information are adopted under Texas Finance Code, §348.0091 (Acts 2009, 81st Leg.), which authorizes the commission to adopt a standard form for the disclosure of the equity in a retail buyer's trade-in motor vehicle.

In reference to all of the amendments, they are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

§84.201. Time Price Differential.

(a) Precomputed retail installment sales contracts. A retail installment sales contract may not contain a time price differential charge that exceeds both the add-on rates authorized by Texas Finance Code, §348.104 and the alternative simple time price differential rate authorized by Texas Finance Code, §348.105 as calculated by the add-on method or scheduled installment earnings method. A retail installment sales contract may be in compliance with either statutory rate specified in this subsection. Prepaid time price differential in the form of points is not permitted.

(b) Time price differential-bearing retail installment sales contracts. A retail installment sales contract may not contain a time price differential charge that exceeds both the maximum annualized daily rate authorized by Texas Finance Code, §348.104 and the alternative simple time price differential rate authorized by Texas Finance Code, §348.105 as calculated by the true daily earnings method. A retail installment sales contract may be in compliance with either statutory rate specified in this subsection. Prepaid time price differential in the form of points is not permitted.

(c) Minimum time price differential. In lieu of the time price differential charge specified under subsections (a) and (b), a retail seller may charge a minimum time price differential charge of $25.

(d) Method of calculation.

(1) Regular payment contract using sum of the periodic balances method. The time price differential charge is computed using the add-on rates authorized by Texas Finance Code, §348.104 or the alternative time price differential rate authorized by Texas Finance Code, §348.105 converted to an equivalent add-on rate per $100 per annum.

(A) Base time price differential charge. The base time price differential charge is determined by multiplying the principal balance subject to a finance charge, as defined by §84.102(13) of this title (regarding Definitions), by the applicable add-on rate per $100 per year for the corresponding term of the contract. If the retail installment contract is payable for a period that is shorter or longer than a year or is for an amount that is less or greater than $100, the amount of the time price differential charge is decreased or increased proportionately.

(B) Add-on rates. The applicable add-on rate per $100 per year is determined by the model year designated by the manufacturer of the vehicle.

(C) Deferred sales tax. For usury purposes, the deferred sales tax is allocated on a straight line basis. A straight line basis is calculated by dividing the original gross deferred sales tax amount by the original term of the contract. The allocation of the deferred sales tax for the final payment must be adjusted for any rounding differences. The payment amount disclosed on the retail installment sales contract must include the straight line allocation of the deferred sales tax per installment.

(D) Conversion of the alternative time price differential rate to an add-on rate per $100 per annum. If the maximum time price differential rate is the rate specified by Texas Finance Code, §348.105, the maximum add-on rate per $100 per annum cannot exceed the add-on rate contained in Figure: 7 TAC §84.201(d)(1)(D). The add-on rate per $100 per annum is determined by converting the current maximum alternative rate authorized by Texas Finance Code, §348.105 to

an equivalent add-on rate for the given monthly term of the contract. The alternative simple time price differential rate authorized by Texas Finance Code, §348.105 displayed as an example in Figure: 7 TAC §84.201(d)(1)(D) is 18% per annum. If the alternative simple time price differential rate is adjusted according to Texas Finance Code, Chapter 303 and is greater than 18% per annum, the add-on rates shown in Figure: 7 TAC §84.201(d)(1)(D) should be adjusted accordingly.
Figure: 7 TAC §84.201(d)(1)(D) (No change.)

(2) Scheduled installment earnings method. The scheduled installment earnings method can be used for both regular and irregular payment contracts.

(A) Maximum time price differential. The maximum time price differential charge is computed by applying the applicable maximum daily rate to the unpaid principal balance subject to a finance charge, as defined by §84.102(13) of this title, as if each payment will be made on its scheduled installment date. A payment received before or after the due date does not affect the amount of the scheduled reduction in the unpaid principal subject to a finance charge. The computation of the time price differential must comply with the U.S. Rule as defined by §84.102(21) of this title.

(B) Maximum annualized daily rate.

(i) Sales tax advanced transactions. On sales tax advanced transactions using the scheduled installment earnings method, the annualized daily rate is either:

(I) the annual percentage rate disclosed on the retail installment sales contract; or

(II) the contract rate if the retail seller requires the retail buyer to purchase credit life or credit accident and health insurance.

(ii) Sales tax deferred transactions. On sales tax deferred transactions using the scheduled installment earnings method, the annualized daily rate is the contract rate.

(iii) Effective rate. The maximum annualized daily rate cannot exceed the effective rate contained in Figure: 7 TAC §84.201(d)(2)(B)(iii) for the equivalent monthly period and appropriate add-on rate per $100 determined by the model year designated by the manufacturer of the vehicle. The effective rates contained in Figure: 7 TAC §84.201(d)(2)(B)(iii) are the current maximum annualized daily rate authorized by Texas Finance Code, §348.104 or the alternative simple time price differential rate authorized by Texas Finance Code, §348.105. The alternative simple time price differential rate authorized by Texas Finance Code, §348.105 displayed as an example in Figure: 7 TAC §84.201(d)(2)(B)(iii) is 18% per annum. If the alternative simple time price differential rate is adjusted according to Texas Finance Code, Chapter 303 and is greater than effective rate contained in Figure: 7 TAC §84.201(d)(2)(B)(iii), the published rate will be highest effective rate.
Figure: 7 TAC §84.201(d)(2)(B)(iii) (No change.)

(iv) Irregular payment contract effective rate. On a retail installment sales contract that is an irregular payment contract, the highest effective rate is determined by taking the closest monthly effective rate as shown in Figure: 7 TAC §84.201(d)(2)(B)(iii) assuming that the contract was payable in substantially equal successive monthly installments beginning one month from the date of the contract.

(I) The closest monthly period is determined as follows:

(-a-) Count the number of days from the date of the contract to the originally scheduled maturity date;

(-b-) Divide the results of item (-a-) of this subclause by 365;

(-c-) Multiply the results of item (-b-) of this subclause by 12.

(II) If the results of subclause (I) of this clause are exactly .5333 or more between the two monthly periods, the closest monthly period is rounded up to the next monthly period. For example, if the closest monthly period is determined to be 14.5333 months, the maximum annualized daily rate is the effective rate for 15 months.

(III) If the results of subclause (I) of this clause are less than .5333 between the two monthly periods, the closest monthly period is rounded down to the previous monthly period. For example, if the closest monthly period is determined to be 14.50 months, the maximum annualized daily rate is the effective rate for 14 months.

(C) Deferred sales tax. For usury purposes, the deferred sales tax is allocated on a straight line basis. A straight line basis is calculated by dividing the original gross deferred sales tax amount by the original term of the contract. The allocation of the deferred sales tax for the final payment must be adjusted for any rounding differences. The payment amount disclosed on the retail installment sales contract must include the straight line allocation of the deferred sales tax per installment.

(D) Contract rate less than the maximum annualized daily rate. If a retail seller consummates a retail installment sales contract with a contract rate that is less than the maximum annualized daily rate, the retail seller must compute the time price differential charge at the disclosed contract rate.

(3) True daily earnings method. The true daily earnings method can be used for both regular and irregular payment contracts.

(A) Maximum time price differential. The maximum time price differential charge is computed by applying the applicable daily rate to the unpaid principal balance subject to a finance charge, as defined by §84.102(13) of this title. The computation of the time price differential must comply with the U.S. Rule as defined by §84.102(21) of this title. The earned time price differential charge is computed as follows:

(i) multiply the unpaid principal balance subject to a finance charge by the applicable daily rate; and

(ii) multiply the results of clause (i) of this subparagraph by the number of days the actual unpaid principal balance subject to a finance charge is outstanding.

(B) Maximum annualized daily rate.

(i) Sales tax advanced transactions. On sales tax advanced transactions using the true daily installment earnings method, the annualized daily rate is either:

(I) the annual percentage rate disclosed on the retail installment sales contract; or

(II) the contract rate if the retail seller requires the retail buyer to purchase credit life or credit accident and health insurance.

(ii) Sales tax deferred transactions. On sales tax deferred transactions using the true daily installment earnings method, the annualized daily rate is the contract rate.

(iii) Effective rate. The maximum annualized daily rate cannot exceed the effective rate contained in Figure: 7 TAC §84.201(d)(2)(B)(iii) for the equivalent monthly period and appro-

priate add-on rate per $100 determined by the model year designated by the manufacturer of the vehicle. The effective rates contained in Figure: 7 TAC §84.201(d)(2)(B)(iii) are the current maximum annualized daily rate authorized by Texas Finance Code, §348.104 or the alternative simple time price differential rate authorized by Texas Finance Code, §348.105. The alternative simple time price differential rate authorized by Texas Finance Code, §348.105 displayed as an example in Figure: 7 TAC §84.201(d)(2)(B)(iii) is 18% per annum. If the alternative simple time price differential rate is adjusted according to Texas Finance Code, Chapter 303 and is greater than effective rate contained in Figure: 7 TAC §84.201(d)(2)(B)(iii), the published rate will be highest effective rate.

(iv) Irregular payment contract effective rate. On a retail installment sales contract that is an irregular payment contract, the highest effective rate is determined by taking the closest monthly effective rate as shown in Figure: 7 TAC §84.201(d)(2)(B)(iii) assuming that the contract was payable in substantially equal successive monthly installments beginning one month from the date of the contract.

(I) The closest monthly period is determined as follows:

(-a-) Count the number of days from the date of the contract to the originally scheduled maturity date;

(-b-) Divide the results of item (-a-) of this subclause by 365;

(-c-) Multiply the results of item (-b-) of this subclause by 12.

(II) If the results of subclause (I) of this clause are exactly .5333 or more between the two monthly periods, the closest monthly period is rounded up to the next monthly period. For example, if the closest monthly period is determined to be 14.5333 months, the maximum annualized daily rate is the effective rate for 15 months.

(III) If the results of subclause (I) of this clause are less than .5333 between the two monthly periods, the closest monthly period is rounded down to the previous monthly period. For example, if the closest monthly period is determined to be 14.50 months, the maximum annualized daily rate is the effective rate for 14 months.

(C) Deferred sales tax. For usury purposes, the deferred sales tax is allocated on a straight line basis. A straight line basis is calculated by dividing the original gross deferred sales tax amount by the original term of the contract. The allocation of the deferred sales tax for the final payment must be adjusted for any rounding differences. The payment amount disclosed on the retail installment sales contract must include the straight line allocation of the deferred sales tax per installment.

(D) Contract rate less than the maximum annualized daily rate. If a retail seller consummates a retail installment sales contract with a contract rate that is less than the maximum annualized daily rate, the retail seller must compute the time price differential charge at the disclosed contract rate.

(E) Application of payments.

(i) General requirements if no payment application specified in contract. If the retail installment sales contract does not prescribe the method for the application of the payment, the payment should be applied in the following order:

(I) earned but unpaid time price differential charge; and

(II) anything else owed under the contract.

(ii) Sales tax deferred transactions assigned to related finance companies. If the retail installment sales transaction is a sales tax deferred transaction in which the retail installment sales contract does not prescribe an application of payments method and the contract has been assigned by a dealer to its related finance company as that term is defined by Texas Tax Code, Chapter 152, the related finance company must apply the payment in the following order:

(I) amount of the straight line allocation of the deferred sales tax, if the transaction is a sales tax deferred transaction;

(II) earned but unpaid time price differential charge; and

(III) anything else owed under the contract.

(iii) Use of model provision sufficient. While the retail installment contract is not required to use the model provision, use of the model provision found in 7 TAC §84.808(21) (relating to Model Clauses), or a variation of it as allowed under that section or 7 TAC §84.809 (relating to Permissible Changes), is deemed to sufficiently prescribe the method of application of payment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. INSURANCE AND DEBT CANCELLATION AGREEMENTS

7 TAC §84.303, §84.305

The Finance Commission of Texas (commission) adopts amendments to 7 TAC §84.303, concerning Provision of Policy or Certificate, and §84.305, concerning Collateral Protection Insurance, relating to the regulation of motor vehicle retail installment sales. The commission adopts the amendments to §84.303 and §84.305 without changes to the proposal published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6032).

The purpose of these amendments is to implement Senate Bill 1965 (SB 1965) as enacted by the 81st Texas Legislature regarding commercial vehicles.

During the 2009 legislative session, the Texas Legislature passed SB 1965 relating to the regulation of retail installment sales contracts for commercial vehicles. Certain provisions within Chapter 348 of the Texas Finance Code are not applicable to transactions involving commercial vehicles. Furthermore, these consumer-oriented provisions prevent commercial buyers from contracting for services related to commercial uses that would not be relevant to a consumer purchase. The intent of SB 1965 is to exempt retail installment sales contracts for commercial vehicles from certain provisions of the Texas Finance Code.

Subsection (b) has been added to §84.303 regarding the provision of a policy or certificate to clarify that the section does not apply to a holder who purchases dual-interest insurance on a Chapter 348 contract involving a commercial vehicle. Similarly, language has been added to §84.305 concerning collateral protection insurance narrowing the applicability to ordinary vehicles. These additions implement SB 1965 by excluding commercial vehicles from both sections.

The commission received no written comments on the proposal.

Regarding statutory authority from recent legislation for particular provisions, the amendments concerning ordinary vehicles are adopted under Texas Finance Code, §348.0015, as enacted by SB 1965 (Acts 2009, 81st Leg.), which authorizes the commission to determine by rule a motor vehicle that is of a type typically used for personal, family, or household use.

In reference to all of the amendments, they are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. LICENSING

7 TAC §84.602

The Finance Commission of Texas (commission) adopts amendments to 7 TAC §84.602, concerning Filing of New Application, relating to the regulation of motor vehicle retail installment sales. The commission adopts the amendments to §84.602 without changes to the proposal published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6033).

The purpose of these amendments is to implement Senate Bill 1965 (SB 1965) as enacted by the 81st Texas Legislature regarding commercial vehicles.

During the 2009 legislative session, the Texas Legislature passed SB 1965 relating to the regulation of retail installment sales contracts for commercial vehicles. Certain provisions within Chapter 348 of the Texas Finance Code are not applicable to transactions involving commercial vehicles. Furthermore, these consumer-oriented provisions prevent commercial buyers from contracting for services related to commercial uses that would not be relevant to a consumer purchase. The intent of SB 1965 is to exempt retail installment sales contracts for commercial vehicles from certain provisions of the Texas Finance Code.

In §84.602(2)(B), clarification has been added, stating that contract forms must only be submitted for transactions involving ordinary vehicles, as per SB 1965. Additionally, an affirmative statement also provides that the applicant does not have to submit retail installment sales contract forms for commercial vehicles.

The commission received no written comments on the proposal.

Regarding statutory authority from recent legislation for particular provisions, the amendments concerning ordinary vehicles are adopted under Texas Finance Code, §348.0015, as enacted by SB 1965 (Acts 2009, 81st Leg.), which authorizes the commission to determine by rule a motor vehicle that is of a type typically used for personal, family, or household use.

In reference to all of the amendments, they are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. EXAMINATIONS

7 TAC §84.707

The Finance Commission of Texas (commission) adopts amendments to 7 TAC §84.707, concerning Files and Records Required (Retail Sellers Assigning Retail Installment Sales Contracts), relating to the regulation of motor vehicle retail installment sales. The commission adopts the amendments to §84.707 without changes to the proposal published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6034).

The purpose of these amendments is to implement recent legislation enacted by the 81st Texas Legislature affecting the regulation of motor vehicle retail installment sales, including the following bills: Senate Bill (SB) 1965 (commercial vehicles), House Bill (HB) 2438 (disclosure of equity and trade-in information), SB 778 (identity recovery service contracts), and SB 1966 (debt cancellation agreements). The following paragraphs provide a general introduction regarding each legislative bill. The purpose paragraphs for each particular amended provision will then provide references to the bill requiring changes to that provision, along with additional detail as necessary.

During the 2009 legislative session, the Texas Legislature passed SB 1965 relating to the regulation of retail installment sales contracts for commercial vehicles. Certain provisions within Chapter 348 of the Texas Finance Code are not applicable to transactions involving commercial vehicles. Furthermore, these consumer-oriented provisions prevent commercial buyers from contracting for services related to commercial uses that would not be relevant to a consumer purchase. The intent of SB 1965 is to exempt retail installment sales contracts for commercial vehicles from certain provisions of the Texas Finance Code.

Due to increasing consumer complaints and legislation considered during the 2007 session, the House Committee on Financial Institutions conducted an interim study regarding motor vehicle installment sales, including two key issues: the financing of negative equity and the retirement of existing debt on a trade-in motor vehicle. Itemization of negative equity under current law has led to confusion among consumers. Concerning the payoff of trade-ins, without an explicit legal requirement for the retail seller to timely pay off trade-in vehicles, late payments and defaults have damaged consumers' credit reports through no fault of their own. With the enactment of HB 2438, the 81st Texas Legislature amended Chapter 348 of the Texas Finance Code in order to address these issues.

Concerns regarding the higher incidence of identity theft have resulted in the sale of services to assist consumers in identity theft prevention, minimizing risk or exposure, and identity recovery. These services had been unregulated and with the general prohibition against any unauthorized fee under Chapter 348, the financing of these services in connection with a retail installment sales contract was in violation of the Texas Finance Code. Consequently, during the 2009 session the legislature enacted SB 778 to address the regulation of these services. The bulk of SB 778 outlines the jurisdiction of the Texas Department of Licensing and Regulation to regulate identity theft prevention and recovery services. However, the bill also authorizes the financing of these services under Texas Finance Code, Chapter 348.

Debt cancellation agreements were authorized to be offered as part of consumer loans in 2003, but at that time the legislature did not address the sale of these products with regard to motor vehicle retail installment sales. With the enactment of SB 1966, the 81st Texas Legislature amended the Texas Finance Code to allow the sale of debt cancellation agreements in connection with Chapter 348 retail installment sales contracts, with certain limitations and restrictions. Specifically, the Texas Legislature added §348.124 to the Texas Finance Code and amended §348.001 (adding a definition of "debt cancellation agreement"), §348.005 (authorizing a fee for debt cancellation agreements as an itemized charge), and §348.208 (conforming changes).

In order to implement SB 1965, changes have been made to §84.707(a) to exempt transactions involving commercial vehicles from the recordkeeping requirements. (Note: Sections 84.708 and 84.709 were proposed in the September 4, 2009, issue of the *Texas Register* in conjunction with §84.707. However, due to coordination with other pending rules, the amendments to §84.708 and §84.709 are not presented for adoption at this time.)

Regarding the disclosure of equity and trade-in information required by HB 2438, a provision has been added to §84.707 for maintenance of the Texas Disclosure of Equity in Trade-In Motor Vehicle, which has been proposed in new §84.204 as published in the September 4, 2009, issue of the *Texas Register.* Although documents evidencing the payoff of trade-in vehicles are required in the existing rules for retail sellers, a statutory reference has been added concerning trade-in information. Likewise, references to the Texas Finance Code as well as proposed new §84.204 are included with the provision regarding the disclosure of equity standard form. These revisions implementing HB 2438 are contained in §84.707(d)(2)(F)(iv) and new (2)(G).

In reference to the compliance date for maintenance of the disclosure of equity standard form, §13(b) of HB 2438 states the following: "Notwithstanding Section 348.0091, Finance Code, as added by this Act, a retail seller is not required to comply with that section until the Finance Commission of Texas prescribes the form required by that section." The amendments outlined in the preceding paragraph are intended to implement the intent of the legislature. The requirement will only apply to a disclosure that has been adopted by the Finance Commission. If the rule establishing the standard disclosure has not been adopted, licensees are not required to use or keep the disclosure until it is adopted. Thus, the compliance date for retaining a copy of the disclosure of equity standard form will coincide with the effective date of 7 TAC §84.204 (i.e., the rule creating the form). While the rule is pending retail sellers must properly disclose equity and trade-in information according to the statutory changes enacted by HB 2438 even in the absence of a standard form adopted by rule.

With SB 778's authorization of identity recovery service contracts, a reference has been added to the parenthetical list of ancillary products contained in §84.707. Specifically, this addition implementing SB 778 is found in §84.707(d)(2)(K).

A provision concerning the debt cancellation agreements authorized by SB 1966 has been added to §84.707 as well. If a licensee issues a debt cancellation agreement, a copy must be maintained as part of the retail installment sales transaction file as contained in §84.707(d)(2)(J).

Additionally, throughout the rule, technical corrections have been made relating to appropriate renumbering or relettering.

The commission received no written comments on the proposal.

Regarding statutory authority from recent legislation for particular provisions, the amendments concerning ordinary vehicles are adopted under Texas Finance Code, §348.0015, as enacted by SB 1965 (Acts 2009, 81st Leg.), which authorizes the commission to determine by rule a motor vehicle that is of a type typically used for personal, family, or household use. The amendments relating to disclosure of equity and trade-in information are adopted under Texas Finance Code, §348.0091 (Acts 2009, 81st Leg.), which authorizes the commission to adopt a standard form for the disclosure of the equity in a retail buyer's trade-in motor vehicle.

In reference to all of the amendments, they are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Commissioner
Office of Consumer Credit Commissioner
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For further information, please call: (512) 936-7621

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SUBCHAPTER H. RETAIL INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §§84.801, 84.802, 84.804, 84.807 - 84.809

The Finance Commission of Texas (commission) adopts amendments to 7 TAC §84.801, concerning Purpose, §84.802, concerning Non-Standard Contract Filing Procedures, §84.804, concerning Disclosures and Contract Provisions Required by Texas Finance Code, §84.807, concerning Contract Provisions, §84.808, concerning Model Clauses, and §84.809, concerning Permissible Changes, relating to plain language requirements for motor vehicle retail installment sales contracts. The commission adopts the amendments to §§84.801, 84.808, and 84.809 with changes and adopts the amendments to §§84.802, 84.804, and 84.807 without changes to the proposal published in the September 4, 2009 issue of the *Texas Register* (34 TexReg 6042).

The commission received three written comments on the proposal from the Texas Automobile Dealers Association, from GMAC, Inc., and from Daimler Truck Financial, a division of DCFS USA LLC. The first comment relates to the term "ordinary vehicle" utilized throughout the proposal and requests the use of alternate terminology. The two latter commenters acknowledge informal discussions of the proposed rules and the resulting revisions addressing many issues. These two comments focus on a single outstanding issue contained in an interim revision to subsection (a) of proposed §84.801. The comments are addressed following the purpose paragraph for the provision receiving comments.

The purpose of these amendments governing plain language contract provisions for Chapter 348 contracts is to implement recent legislation enacted by the 81st Texas Legislature, including the following bills: Senate Bill (SB) 1965 (commercial vehicles), SB 1966 (debt cancellation agreements), SB 778 (identity recovery service contracts), and House Bill (HB) 3621 (documentary fees). The following paragraphs provide a general introduction regarding each legislative bill. The purpose paragraphs for each particular amended provision will then provide references to the bill(s) requiring changes to that provision, along with additional detail as necessary.

During the 2009 legislative session, the Texas Legislature passed SB 1965 relating to the regulation of retail installment sales contracts for commercial vehicles. Certain provisions within Chapter 348 of the Texas Finance Code are not applicable to transactions involving commercial vehicles. Furthermore, these consumer-oriented provisions prevent commercial buyers from contracting for services related to commercial uses that would not be relevant to a consumer purchase. The intent of SB 1965 is to exempt retail installment sales contracts for commercial vehicles from certain provisions of the Texas Finance Code.

Debt cancellation agreements were authorized to be offered as part of consumer loans in 2003, but at that time the legislature did not address the sale of these products with regard to motor vehicle retail installment sales. With the enactment of SB 1966, the 81st Texas Legislature amended the Texas Finance Code to allow the sale of debt cancellation agreements in connection with Chapter 348 retail installment sales contracts, with certain limitations and restrictions. Specifically, the Texas Legislature added §348.124 to the Texas Finance Code and amended §348.001 (adding a definition of "debt cancellation agreement"), §348.005 (authorizing a fee for debt cancellation agreements as an itemized charge), and §348.208 (conforming changes).

Concerns regarding the higher incidence of identity theft have resulted in the sale of services to assist consumers in identity theft prevention, minimizing risk or exposure, and identity recovery. These services had been unregulated and with the general prohibition against any unauthorized fee under Chapter 348, the financing of these services in connection with a retail installment sales contract was in violation of the Texas Finance Code. Consequently, during the 2009 session the legislature enacted SB 778 to address the regulation of these services. The bulk of SB 778 outlines the jurisdiction of the Texas Department of Licensing and Regulation to regulate identity theft prevention and recovery services. However, the bill also authorizes the financing of these services under Chapter 348.

The maximum documentary fee for motor vehicle dealers had been $50 for more than 15 years. Due to the additional costs of federal requirements to protect consumer information placed on dealers during this time, the costs of processing motor vehicle retail installment sales contracts has risen and been absorbed by the industry. The 81st Texas Legislature enacted HB 3621 in order to remove the $50 cap on the documentary fee charged on contracts under Chapter 348 of the Texas Finance Code. The bill requires that a documentary fee not exceed a reasonable amount for handling documents relating to the sale of a motor vehicle. Additionally, HB 3621 authorizes the agency to review the amount of a documentary fee charged for reasonableness and to set standards concerning reasonable amounts. However, this rule adoption focuses on the required changes to plain language disclosures.

The amendments to the purpose section in §84.801(a) implement SB 1965 by adding language to narrow application of Subchapter H, Retail Installment Sales Contract Provisions, to transactions involving ordinary vehicles. Clarifying statements provide that retail sellers and holders of retail installment sales contracts involving commercial vehicles may utilize the applicable model provisions but that such parties are not obligated to comply with the subchapter.

One commenter requests "the agency to substitute the term *non-commercial vehicle* in lieu of the term 'ordinary vehicle' throughout its proposals published in the September 4, 2009, *Texas Register* . . . ." (emphasis in original). The commenter further states that "the description of a non-commercial vehicle as 'ordinary' is not as descriptive as 'non-commercial vehicle' " and that "the use of the term 'ordinary' bears a connotation that a vehicle is mediocre instead of the intended definition that the vehicle is for personal, family, or household use." (footnote omitted).

The use of the term "ordinary vehicle" has been engrained in the motor vehicle installment sales regulations for more

than nine years. Furthermore, after the passage of the plain language statutory requirements in 2001, the plain language rules and forms were modeled after the existing regulations, hence incorporating the "ordinary vehicle" terminology. In the development of the plain language contracts during the early 2000s, it was thought that utilizing "ordinary vehicle" would bear a more striking contrast to "commercial" and "heavy commercial" vehicles. In addition to the model clauses in §84.808, the term "ordinary vehicle" has also been employed with regard to default charges in §84.202. Moreover, the commission's published rules regarding debt cancellation agreements (§§84.301, 84.302, and 84.308) also utilize this term as a helpful distinction from commercial vehicles that is also consistent with the terminology in current regulations. The commission disagrees with the commenter's suggested connotation regarding "ordinary vehicle" and believes it to be an appropriate descriptor for the transactions to which it applies. Thus, the commission declines the commenter's substitute term and maintains the use of "ordinary vehicle" for this adoption.

Due to informal comments received, for this adoption subsection (a) of §84.801 has been reorganized and revised in order to provide better clarity regarding the use of the model provisions in commercial transactions. First, the subsection has been divided in two paragraphs designated as follows: "(1) Model provisions applicable to ordinary vehicles," and "(2) Model provisions applicable to ordinary vehicles, but may be used for commercial vehicles if not prohibited by law." In new paragraph (1), the clarifying phrase "for ordinary vehicles" has been added to end of the first sentence. The three sentences proposed following that sentence have been relocated to paragraph (2), resulting in better flow and readability of the provisions as they relate to either ordinary or commercial vehicles. The last relocated sentence has been revised and now reads: "A retail seller or holder of retail installment sales contracts involving commercial vehicles may utilize some or all of the model provisions of this subchapter in creating a retail installment sales contract." These changes replace the phrase "the applicable" with "some or all of the" before "model provisions" so that it is clear a commercial vehicle creditor may pick and choose which model provisions to use in creating a contract and that all applicable model provisions do not have to be utilized. Also, the incorrect reference to "subsection" has been replaced with "subchapter."

As a result of informal comments received, an interim revision to the proposal was made by adding a new sentence to the end of paragraph (2). The interim revision states: "However, a retail seller or holder that utilizes any of the model provisions from this subchapter will be bound by the provisions utilized." Upon review of §84.801(a) in its entirety along with the informal comments received, the agency believed that this important concept of legal obligation should be included for the adoption. The new sentence clarifies that in a commercial vehicle transaction, a retail seller or holder who includes the model provisions will be bound by the contracted language, even if such language has greater protection for the retail buyer than the statutory provisions governing commercial transactions.

Two official commenters disagree with this interim revision and request that it be removed. One commenter states: "The Finance Commission has no authority to, by rule, impose a plain language requirement to commercial transactions, when the legislature has expressly excluded commercial transactions from those requirements." The commenter continues by stating: "The same result obtains under the federal rule. Commercial transactions are excluded from the federal Truth in Lending Act and Regulation Z promulgated under it. A creditor who uses a form designed under Regulation Z in a commercial transaction does not by doing so make the regulation apply to a transaction that is excluded from the regulation."

In suggesting the interim revision, the agency did not intend to "impose a plain language requirement to commercial transactions." As stated by one commenter: "Commercial contracts are not subject to the plain language requirements under the statute. Texas Finance Code §341.502(a). The proposed rule reflects this." In fact, the following statement is included in the proposed rule, the interim revision, and this adoption: "A retail seller or holder of retail installment sales contracts involving commercial vehicles is not required or obligated to comply with the provisions of this subchapter." The interim revision does not change or negate this statement. The commission agrees with the commenters that the plain language requirements and the amendments to them contained in 7 TAC, Chapter 84, Subchapter H, do not apply to commercial transactions. Furthermore, the interim revision simply clarifies that a commercial creditor who uses the model provisions continues to be bound by language placed in the contract by that commercial creditor. In other words, a creditor who utilizes the model provisions in a transaction involving commercial vehicles will be obligated under contract law to comply with the language the creditor chooses to include in its contract. Of course, should a model provision utilized conflict or be prohibited by statute, the statute would control; but from the agency's experience, the model provisions as applicable to consumer transactions generally involve more restricted rights for creditors in order to protect consumers. The interim revision is intended to alert commercial creditors that they must choose the language of their contracts with care. A commercial creditor will not be able to use a model provision and then attempt to avoid the plain language of the contract the creditor drafted absent a statutory conflict. Therefore, due to the preceding explanation, the commission maintains the interim revision for this adoption.

Further implementation of SB 1965 is found in the addition of subsection (e) to §84.802. The new provision states that retail installment sales contracts involving commercial vehicles do not have to be submitted under the non-standard contract filing procedures outlined by the section.

The changes to §84.804(4) simply provide inclusion within the list of itemized charges for two products newly authorized by the legislature: debt cancellation agreements (as per SB 1966), and identity recovery service contracts (as per SB 778). Other items within the list have been relettered accordingly. Similarly, the amendment to §84.807(12) clarifies that a Chapter 348 contract may include a model provision regarding optional insurance coverages as well as debt cancellation agreements.

In §84.808(5) concerning identification of a motor vehicle, language has been added to clarify that the primary purpose designation may be used to determine whether the vehicle was purchased primarily for commercial purposes or primarily for personal, family, or household use. The retail seller or holder may rely on this representation unless that party has actual knowledge to the contrary. These additions implement SB 1965.

The figures contained in §84.808(8)(A) and (B) have been revised in order to incorporate the statutory changes to the documentary fee notice, as enacted by HB 3621. The actual text of these changes is included in the documentary fee provisions found in §84.808(9)(A) and (B), along with the revised Spanish translations. References to heavy commercial vehicles have been deleted from the disclosures. Additionally, paragraphs

(9)(A) and (B) also contain a few technical corrections to improve clarity and grammar.

Regarding Figures §84.808(8)(A) and (B), additional technical corrections have been made as a result of informal comments received. In Figure §84.808(8)(A), in the optional caption listed under item 5, second sentence, the word "parts" has been replaced with the more accurate phrase "part or all." The same optional caption sentence in Figure §84.808(8)(B) has been amended to match Figure §84.808(8)(A). Additionally, the following sentence has been added at the end of the note included at the very bottom of each figure: "Under item 4, a creditor may add a line for 'other insurance paid to insurance company'." This other insurance line had been replaced with the debt cancellation agreement fee line, but the agency has provided the option for creditors needing this other insurance line to insert it as well.

In June and July 2009, the agency issued two Motor Vehicle Advisory Bulletins providing that licensees would be permitted to use the old documentary fee language until August 31, 2010 should a licensee continue to charge $50 or less. An informal commenter requested that the agency consider incorporating this concept from the bulletins into the rules. The agency agrees that inclusion of the pre-September 1, 2009 language continued for this purpose would be helpful to licensees. Thus, while the statutorily required changes to the documentary fee notices contained in §84.808(9)(A) and (B) remain in this adoption, new subparagraphs (C) and (D) containing the old language have been added, qualifying their use through August 31, 2010. In addition, new subparagraph (E) states that on September 1, 2010, §84.808(9)(C) and (D) will be null and void.

Technical corrections have been made to figures §84.808(7), (11), and (13), but the language and substance of the provisions remain the same.

Figure §84.808(11) has been updated since the proposal to reflect the current citation of a referenced rule that has been relocated.

In §84.808(12), the rule text and accompanying figure regarding optional insurance coverages have been amended to incorporate notice information concerning debt cancellation agreements. These changes implement SB 1966.

At the request of an informal commenter, the option to provide a separate disclosure for debt cancellation agreements, i.e. separate from the optional insurance coverages disclosure contained in Figure §84.808(12), has been added. For this adoption, new subparagraph (B) states as follows: "A retail seller at its option may create a separate disclosure for the authorization of the debt cancellation agreement."

Since the proposal, Figure §84.808(12) regarding optional insurance coverages and debt cancellation agreements has experienced several changes as a result of informal comments and internal corrections. In the first paragraph, the first and third sentences have been revised grammatically in order to properly apply to someone purchasing optional insurance, a debt cancellation agreement, or both. Additionally, at the request of an informal commenter, a notation has been added to the end of the paragraph as follows: "Note: If this form is used for commercial transactions, a creditor has the option to bold the language in the preceding paragraph."

Further grammatical and clarification changes have been made to the paragraph in Figure §84.808(12) beginning with "**" (two asterisks), which is the debt cancellation agreement footnote. For this adoption, the paragraph reads: "**YOU WILL CANCEL CERTAIN AMOUNTS I OWE UNDER THIS CONTRACT IN THE CASE OF A TOTAL LOSS OR THEFT OF THE VEHICLE AS STATED IN THE DEBT CANCELLATION AGREEMENT. I can cancel the debt cancellation agreement without charge for a period of 30 days from the date of this contract, or for the period stated in the debt cancellation agreement, whichever period ends later."

The final revision to Figure §84.808(12) since the proposal involves clarification to the sentence above the buyer's signature line, which reads as follows: "For the premiums or fees included above, I want the related optional coverages and debt cancellation agreement."

And finally, the sample model contract provided in Figure §84.809(b) includes all of the contract revisions previously outlined, combining the permitted model clauses into one document.

As with the proposed revisions, the changes made to all other contract provisions for this adoption have been incorporated into Figure §84.809(b), which contains the complete sample model contract.

Regarding statutory authority from recent legislation for particular provisions, the amendments concerning ordinary vehicles are adopted under Texas Finance Code, §348.0015, as enacted by SB 1965 (Acts 2009, 81st Leg.), which authorizes the commission to determine by rule a motor vehicle that is of a type typically used for personal, family, or household use.

In reference to all of the amendments, they are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

§84.801. Purpose.

(a) Purpose.

(1) Model provisions applicable to ordinary vehicles. The purpose of this subchapter is to provide model provisions and a model plain language contract in English for Texas Finance Code, Chapter 348 motor vehicle installment sales contract provisions for ordinary vehicles. The establishment of model provisions for these transactions will encourage the use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. Use of the "plain language" model contract by a seller is not mandatory. Except for retail installment sales contracts involving commercial vehicles, the seller, however, may not use a contract other than a model contract unless the seller has submitted the contract to the commissioner in compliance with §84.802 of this title (relating to Non-Standard Contract Filing Procedures). The commissioner shall issue an order disapproving the contract if the commissioner determines the contract does not comply with this section or rules adopted under this section. A seller may not claim the commissioner's failure to disapprove a contract constitutes approval.

(2) Model provisions applicable to ordinary vehicles, but may be used for commercial vehicles if not prohibited by law. This subchapter only applies to retail installment sales transactions involving ordinary vehicles. A retail seller or holder of retail installment sales contracts involving commercial vehicles is not required or obligated to comply with the provisions of this subchapter. A retail seller or holder

of retail installment sales contracts involving commercial vehicles may utilize some or all of the model provisions of this subchapter in creating a retail installment sales contract. However, a retail seller or holder that utilizes any of the model provisions from this subchapter will be bound by the provisions utilized.

(b) These provisions are intended to constitute a complete plain language motor vehicle installment sales contract; however, a seller is not limited to the contract provisions contained in these rules.

§84.808. Model Clauses.

The following model clauses provide the plain language equivalent of provisions found in contracts subject to Texas Finance Code, Chapter 348.

(1) Identification of parties. This information identifies the parties to the contract.

(A) The model identification clause lists the name and address of the creditor, the date of the contract, and the name and address of the buyer. At the creditor's option, a creditor may include an account number or contract number. The model clause reads:
Figure: 7 TAC §84.808(1)(A) (No change.)

(B) The Buyer is referred to as "I" or "me." The Seller is referred to as "you" or "your."

(2) Assignment of contract. The model clause regarding assignment of contract reads: "This contract may be transferred by the Seller."

(3) Buyer's affirmation and promise to pay. The model clause regarding buyer's affirmation and promise to pay reads: "The credit price is shown below as the "Total Sales Price." The "Cash Price" is also shown below. By signing this contract, I choose to purchase the motor vehicle on credit according to the terms of this contract. I agree to pay you the Amount Financed, Finance Charge, and any other charges in this contract. I agree to make payments according to the Payment Schedule in this contract. If more than one person signs as a buyer, I agree to keep all the promises in this agreement even if the others do not."

(4) Inspection acknowledgment. The model clause regarding inspection acknowledgment reads: "I have thoroughly inspected, accepted, and approved the motor vehicle in all respects."

(5) Identification of motor vehicle. The motor vehicle identification information provision should contain the following information about the motor vehicle: the seller's stock number; the manufacturer's year model; the manufacturer's make; the manufacturer's model type or number; the vehicle identification number; the license plate number (if applicable); a new/used designation; and the primary purpose designation. The primary purpose designation may be used to determine whether the vehicle was purchased primarily for commercial purposes or primarily for personal, family or household purposes. Unless the retail seller or holder has actual knowledge that the representation is not true, the retail seller or holder may rely upon the representation made in the primary purpose designation, as permitted by Texas Finance Code, §348.0015(b). The seller's stock number and the license number are both optional; the omission will not make a contract non-standard. The motor vehicle identification information provision may include additional information about the vehicle including, odometer reading, color, the designation as a heavy commercial vehicle, and key code. If the creditor includes this additional information about the motor vehicle, the change will not make the provision a non-standard provision. The model clause regarding identification of the motor vehicle reads:
Figure: 7 TAC §84.808(5) (No change.)

(6) Trade-in vehicle description. The model clause regarding trade-in vehicle description reads:
Figure: 7 TAC §84.808(6) (No change.)

(7) Truth in Lending Act disclosure. The model clause regarding Truth in Lending Act disclosure reads:
Figure: 7 TAC §84.808(7)

(8) Itemization of amount financed. The creditor drafting the contract is given considerable flexibility regarding the itemization of amount financed disclosure so long as the itemization of amount financed disclosure complies with the Truth in Lending Act. As an example, a creditor may disclose the manufacturer's rebate either as: a component of the downpayment; or a deduction from the cash price of the motor vehicle. The model contract provision for the itemization of the amount financed discloses the manufacturer's rebate as a component of the downpayment. If the creditor elected to disclose the manufacturer's rebate as a deduction from the cash price of the motor vehicle, the cash price component of the itemization of amount financed would be amended to reflect the dollar amount of the manufacturer's rebate being deducted from the cash price of the motor vehicle.

(A) The model clause regarding itemization of amount financed-sales tax advance reads:
Figure: 7 TAC §84.808(8)(A)

(B) The model clause regarding itemization of amount financed-sales tax deferred reads:
Figure: 7 TAC §84.808(8)(B)

(C) Plate transfer fee. Under Texas Transportation Code, §502.453, the creditor may charge under the itemization of amount financed a $5.00 fee for transferring license plates and receiving new registration insignia. The creditor may document the plate transfer fee in the Other Charges section with the following language: "to State for Plate Transfer Fee."

(D) Compliance fee prohibited. Under Texas Transportation Code, §503.0631(f), the creditor is prohibited from assessing an itemized charge under the itemization of amount financed for costs associated with complying with the temporary tag database.

(9) Documentary fee.

(A) The following notice satisfies the requirements of Texas Finance Code, §348.006 if printed in type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous and within reasonable proximity to the place at which the fee is disclosed. The model clause is contained in the Itemization of Amount Financed. The documentary fee clause reads: "A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents relating to the sale. A documentary fee may not exceed a reasonable amount agreed to by the parties. This notice is required by law."

(B) The following notices are sufficient Spanish translations of the documentary fee disclosure required by Texas Finance Code, §348.006. The Spanish translation may read:

(i) "Un honorario de documentación no es un honorario oficial. Un honorario de documentación no es requerido por la ley, pero puede ser cargada al comprador como gastos de manejo de documentos relacionados con una venta. Un honorario de documentación no puede exceder una cantidad razonable acordada por las partes. Esta notificación es requerida por la ley."; or

(ii) "Un cargo documental no es un cargo oficial. La ley no exige que se imponga un cargo documental. Pero éste podría cobrarse a los compradores por el manejo de la documentación en relación

con la venta. Un cargo documental no puede exceder una cantidad razonable acordada por las partes. Esta notificación se exige por ley."

(C) Until August 31, 2010, if the dealer does not charge an amount in excess of $50, the following notice satisfies the requirements of Texas Finance Code, §348.006 if printed in type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous and within reasonable proximity to the place at which the fee is disclosed. The parenthetical phrase may be inserted at the dealer's option or the disclosure may be made without the parenthetical phrase if the dealer does not charge an amount in excess of $50 for either ordinary motor vehicles or heavy commercial vehicles or if the contract form is not used for heavy commercial vehicles. The model clause is contained in the Itemization of Amount Financed. The documentary fee clause reads: "A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50 (for a motor vehicle contract or a reasonable amount agreed to by the parties for a heavy commercial vehicle contract). This notice is required by law."

(D) Until August 31, 2010, if the dealer does not charge an amount in excess of $50, the following notices are sufficient Spanish translations of the documentary fee disclosure required by Texas Finance Code, §348.006. The parenthetical phrase may be inserted at the dealer's option or the disclosure may be made without the parenthetical phrase if the dealer does not charge an amount in excess of $50 for either ordinary motor vehicles or heavy commercial vehicles or if the contract form is not used for heavy commercial vehicles. The Spanish translation may read:

(i) "Un honorario de documentación no es un honorario oficial. Un honorario de documentación no es requerido por la ley, pero puede ser cargada al comprador como gastos de manejo de documentos y para realizar servicios relacionados con el cierre de una venta. Un honorario de documentación no puede exceder $50 (un contrato de vehículo automotor o una cantidad razonable acordada por las partes para un contrato de vehículo comercial pesado). Esta notificación es requerida por la ley."; or

(ii) "Un cargo documental no es un cargo oficial. La ley no exige que se imponga un cargo documental. Pero éste podría cobrarse a los compradores por el manejo de la documentación y la prestación de servicios en relación con el cierre de una venta. Un cargo documental no puede exceder de $50 para (un contrato de vehículo automotor o una cantidad razonable acordada por las partes para un contrato de vehículo comercial pesado). Esta notificación se exige por ley."

(E) Effective September 1, 2010, the documentary fee disclosures contained in paragraphs (9)(C) and (D) of this section are null and void.

(10) Deferred downpayments. The creditor has considerable flexibility in disclosing the deferred downpayments. The model provision discloses the deferred downpayments by placing the information, the due date and dollar amount of the deferred downpayments, in several boxes. If a creditor uses this model provision, the creditor would enter the due date and dollar amount of each deferred downpayment in the appropriate boxes. As an alternative to this model provision, a creditor may disclose the deferred downpayments in the Payment Schedule of the Amount Financed in the federal disclosure box. If a creditor elects this option, the due date and the dollar amount of the deferred downpayment must be shown. If the total amount of the deferred downpayment is not satisfied by the date of the second regularly scheduled installment, the deferred downpayment must be included in the Payment Schedule. As another alternative, the creditor may disclose the deferred downpayment amount in the Payment Schedule. The model clause regarding deferred downpayments reads:
Figure: 7 TAC §84.808(10) (No change.)

(11) Required physical damage insurance. The creditor may choose to omit the statement of the retail buyer's right to obtain substitute coverage from another source. The model clause regarding required physical damage insurance reads:
Figure: 7 TAC §84.808(11)

(12) Optional insurance coverages and debt cancellation agreement.

(A) The model clause regarding optional insurance coverages and debt cancellation agreement reads:
Figure: 7 TAC §84.808(12)(A)

(B) A retail seller at its option may create a separate disclosure for the authorization of the debt cancellation agreement.

(13) Optional credit life and accident and health insurance. The model clause regarding optional credit life and accident and health insurance reads:
Figure: 7 TAC §84.808(13)

(14) Liability insurance. If liability insurance coverage is not included in the contract, any of the following notices are sufficient to satisfy the requirements of Texas Finance Code, §348.205 if printed in a size equal to at least 10-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous:

(A) "THIS CONTRACT DOES NOT INCLUDE INSURANCE COVERAGE FOR PERSONAL LIABILITY AND PROPERTY DAMAGE CAUSED TO OTHERS."

(B) "UNLESS A CHARGE FOR LIABILITY INSURANCE IS INCLUDED IN THE ITEMIZATION OF AMOUNT FINANCED, LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED IN THIS CONTRACT."

(C) "UNLESS A CHARGE FOR LIABILITY INSURANCE IS INCLUDED IN THE ITEMIZATION OF AMOUNT FINANCED, ANY INSURANCE REFERRED TO IN THIS CONTRACT DOES NOT INCLUDE COVERAGE FOR PERSONAL LIABILITY AND PROPERTY DAMAGE CAUSED TO OTHERS."

(15) Prohibition against oral modifications. The contract may include a provision barring oral modifications of the contract. A unilateral change to a contract may nevertheless occur as prescribed by the procedures in Texas Finance Code, Chapter 349, Subchapter C. The model clause regarding prohibition against oral modifications reads:
Figure: 7 TAC §84.808(15) (No change.)

(16) Finance charge earnings methods:

(A) Regular transaction using sum of the periodic balances method.

(i) Sales tax advance. At the creditor's option a creditor may choose one of the following model clauses regarding sales tax advance:

(I) "You figure the Finance Charge using the add-on method as defined by the Texas Finance Commission Rule. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance and added as a lump sum to the unpaid principal balance for the full term of the contract." Or

(II) "The Finance Charge will be calculated by using the add-on method. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance and added as a lump sum to the unpaid principal balance for the full term of the contract. The add-on Finance Charge is calculated at a rate of $____ per $100.00."

(ii) Deferred sales tax. The model clause regarding deferred sales tax reads: "The Finance Charge will be calculated by using the add-on method. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance subject to a finance charge and added as a lump sum to the unpaid principal balance subject to a Finance Charge for the full term of the contract. The add-on Finance Charge is calculated at a rate of $____ per $100.00."

(B) True daily earnings method.

(i) Sales tax advance. At the creditor's option a creditor may choose one of the following model clauses regarding sales tax advance:

(I) "You figure the Finance Charge using the true daily earnings method as defined by the Texas Finance Code. Under the true daily earnings method, the Finance Charge will be figured by applying the daily rate to the unpaid portion of the Amount Financed for the number of days the unpaid portion of the Amount Financed is outstanding. The daily rate is 1/365th of the Annual Percentage Rate. The unpaid portion of the Amount Financed does not include late charges or returned check charges." Or

(II) If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is not deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance. The daily rate is 1/365th of the contract rate. The unpaid principal balance does not include the late charges or returned check charges."

(ii) Deferred sales tax: If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance subject to a Finance Charge. The daily rate is 1/365th of the contract rate. The unpaid principal balance subject to a finance charge does not include the late charges, sales tax, or returned check charges."

(C) Scheduled installment earnings method.

(i) Sales tax advance. At the creditor's option a creditor may choose one of the following model clauses regarding sales tax advance:

(I) "You figure the Finance Charge using the scheduled installment earnings method as defined by the Texas Finance Code. Under the scheduled installment earnings method, the Finance Charge is figured by applying the daily rate to the unpaid portion of the Amount Financed as if each payment will be made on its scheduled payment date. The daily rate is 1/365th of the Annual Percentage Rate. The unpaid portion of the Amount Financed does not include late charges or returned check charges." Or

(II) If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is not deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance. You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. The unpaid principal balance does not include the late charges or returned check charges."

(ii) Deferred sales tax. If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You figured the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance subject to a Finance Charge. You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. The unpaid principal balance subject to a Finance Charge does not include the late charges, sales tax, or returned check charges."

(17) Consumer warning. The following notices satisfy the requirements of Texas Finance Code §348.102(d) if printed in at least 10-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous.

(A) For contracts using the sum of the periodic balances method (Rule of 78s) or the scheduled installment earnings method, the notice may read:

(i) "NOTICE TO THE BUYER--I WILL NOT SIGN THIS CONTRACT BEFORE I READ IT OR IF IT CONTAINS ANY BLANK SPACES. I AM ENTITLED TO A COPY OF THE CONTRACT I SIGN. UNDER THE LAW, I HAVE THE RIGHT TO PAY OFF IN ADVANCE ALL THAT I OWE AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE. I WILL KEEP THIS CONTRACT TO PROTECT MY LEGAL RIGHTS." Or

(ii) "NOTICE TO THE BUYER--THE BUYER SHOULD NOT SIGN THIS CONTRACT BEFORE READING IT OR IF IT CONTAINS ANY BLANK SPACES. THE BUYER IS ENTITLED TO A COPY OF THE SIGNED CONTRACT. UNDER THE LAW, THE BUYER HAS THE RIGHT TO PAY OFF IN ADVANCE ALL THAT THE BUYER OWES AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE. THE BUYER SHOULD KEEP THIS CONTRACT TO PROTECT ITS LEGAL RIGHTS."

(B) For contracts using the true daily earnings method, the notice may read: "NOTICE TO THE BUYER--I WILL NOT SIGN THIS CONTRACT BEFORE I READ IT OR IF IT CONTAINS ANY BLANK SPACES. I AM ENTITLED TO A COPY OF THE CONTRACT I SIGN. UNDER THE LAW, I HAVE THE RIGHT TO PAY OFF IN ADVANCE ALL THAT I OWE AND UNDER CERTAIN CONDITIONS MAY SAVE A PORTION OF THE FINANCE CHARGE. I WILL KEEP THIS CONTRACT TO PROTECT MY LEGAL RIGHTS."

(18) Buyer's acknowledgment of contract receipt.

(A) The following acknowledgments conform to the requirements of Texas Finance Code, §348.112 if they appear directly above the place for the buyer's signature in at least 10-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous. A creditor may choose the most appropriate option:

(i) If the buyer's signature is dated. If this clause is chosen, the copy must be mailed within a reasonable period of time. A reasonable period of time would ordinarily be three days,

excluding Sundays and holidays. The model acknowledgment may read: "I AGREE TO THE TERMS OF THIS CONTRACT. WHEN I SIGN THE CONTRACT, I WILL RECEIVE THE COMPLETED CONTRACT. IF NOT, I UNDERSTAND THAT A COPY WILL BE MAILED TO ME WITHIN A REASONABLE TIME."

(ii) If the buyer's signature is not dated. The model acknowledgment may read: "I AGREE TO THE TERMS OF THIS CONTRACT. I CONFIRM THAT BEFORE I SIGNED THIS CONTRACT, YOU GAVE IT TO ME, AND I WAS FREE TO TAKE IT AND REVIEW IT. I RECEIVED THE COMPLETED CONTRACT ON _____ (MO.) (DAY) (YR.)."

(iii) If the buyer's signature is not dated. If this clause is chosen, the copy must be mailed within a reasonable period of time. The model acknowledgment may read: "I SIGNED THIS CONTRACT ON _____ AND A COPY WILL BE MAILED TO ME WITHIN A REASONABLE TIME."

(iv) If the buyer's signature is not dated but the contract contains the date of the transaction. The model acknowledgment may read: "I AGREE TO THE TERMS OF THIS CONTRACT AND ACKNOWLEDGE RECEIPT OF A COMPLETED COPY OF IT. I CONFIRM THAT BEFORE I SIGNED THIS CONTRACT, YOU GAVE IT TO ME, AND I WAS FREE TO TAKE IT AND REVIEW IT."

(B) Acceptance of contract receipt. The model clause regarding acceptance of contract receipt reads:
Figure: 7 TAC §84.808(18)(B) (No change.)

(19) Consumer Credit Commissioner notice. The following notice satisfies the requirements of Texas Finance Code, §14.104 and §86.101 of this title (relating to Consumer Notifications). The telephone number of the retail seller, creditor, or holder may be printed in conjunction with the name and address of the retail seller, creditor, or holder elsewhere on the contract or agreement provided the notice required by Texas Finance Code, §14.104 is amended to direct the reader's attention to the area of the contract where the telephone number may be found. The consumer credit commissioner notice reads: "To contact (insert authorized business name of retail seller, creditor or holder as appropriate) about this account, call (insert telephone number of retail seller, creditor, or holder as appropriate). This contract is subject in whole or in part to Texas law which is enforced by the Consumer Credit Commissioner, 2601 N. Lamar Blvd., Austin, Texas 78705-4207; (800) 538-1579; www.occc.state.tx.us, and can be contacted relative to any inquiries or complaints."

(20) Finance charge refund method. If a contract uses the finance charge refunding method of the sum of the periodic balances or the scheduled installment earnings method, the finance charge refund provision reads: "If I prepay in full, I may be entitled to a refund of part of the Finance Charge." On contracts using the true daily earnings method, this finance charge refund provision should not be disclosed because it is not applicable.

(A) Contracts using the sum of the periodic balances method.

(i) Name of method. The model clause to identify the method of refunding finance charge reads: "You will figure the Finance Charge refund by using the sum of the periodic balances method as defined by the Texas Finance Commission rule."

(ii) Optional description of method. The creditor may include the following additional description of the method. The model clause reads: "You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule. The Finance Charge Refund will be computed upon the entire Finance Charge minus the Acquisition Cost. I will not get a refund if it is less than $1.00."

(iii) Optional description of method for use in contracts for heavy commercial vehicles. At the creditor's option, a contract for a heavy commercial vehicle, as defined in the Texas Finance Code, may include the following description of the method. The model clause reads: "You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule. The Finance Charge refund will be computed based upon the entire Finance Charge calculated using the sum of the periodic balances method. Then you will subtract the Acquisition Cost from that amount. I will not get a refund if it is less than $1.00."

(B) Contracts using the scheduled installment earnings method.

(i) Name of method. The model clause to identify the method of refunding finance charge reads: "You will figure the Finance Charge refund by the scheduled installment earnings method as defined by the Texas Finance Commission rule."

(ii) Optional description of method. The creditor may include the following additional description of the method: "You will figure my refund by deducting earned finance charges from the Finance Charge. You will figure earned finance charges by applying a daily rate to the unpaid principal balance as if I paid all my payments on the date due. If I prepay between payment due dates, you will figure earned finance charges for the partial payment period. You do this by counting the number of days from the due date of the prior payment through the date I prepay. You then multiply that number of days times the daily rate. The daily rate is 1/365th of the Annual Percentage Rate. You will also add the acquisition cost of $25 (or $150 for a heavy commercial vehicle) to the earned finance charge. I will not get a refund if it is less than $1.00."

(C) Flexible contract forms designed to accommodate alternative methods. Creditors may use a flexible contract form with alternative earnings methods, so long as the method used on a particular contract is permissible for that contract. The following clause illustrates one way that this flexibility may be accomplished: "You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule if: this contract is a Regular Payment Contract as defined by the Texas Finance Commission rule, and this contract does not have a term greater than 61 months. If this contract is not a Regular Payment Contract or if it has a term greater than 61 months, you will figure the Finance Charge refund using the scheduled installment earnings method as defined by the Texas Finance Commission rule. I will not get a refund if it is less than $1.00."

(21) Application of payments. In this provision, the term "finance charge" should not be construed to have the same meaning as Finance Charge as defined by the Truth in Lending Act. A default or late charge is considered to be a finance charge under Texas law; therefore, a default or late charge can be charged and collected as part of the earned finance charge. At the creditor's option the creditor may modify the application of payments language by adding "and late charges" following the phrase "earned but unpaid finance charge." The model clause reads:
Figure: 7 TAC §84.808(21) (No change.)

(22) Effect of early and late payments. For contracts using the true daily earnings method, the model clause reads: "You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. If I do not timely make all my payments in at least the correct amount, I will have to pay more Finance Charge and my last payment will be more than my final scheduled payment. If

I make scheduled payments early, my Finance Charge will be reduced (less). If I make my scheduled payments late, my Finance Charge will increase."

(23) Interest on matured amount. The model provision for interest on any matured amount at any rate permitted by law reads: "If I don't pay all I owe when the final payment becomes due, or I do not pay all I owe if you demand payment in full under this contract, I will pay an interest charge on the amount that is still unpaid. That interest charge will be the higher rate of 18% per year or the maximum rate allowed by law, if that rate is higher. The interest charge for this amount will begin the day after the final payment becomes due." In this provision, the maximum rate allowed by law refers to the rate found in Texas Finance Code, Chapter 303.

(24) Balloon payments. If the contract has a balloon payment, the creditor must include a provision in the contract that allows the buyer to refinance the balloon payment over time. The provision must comply with Texas Finance Code, §348.123. The model provision for defining the balloon payment reads: "A balloon payment is a scheduled payment more than twice the amount of the average of my scheduled payments, other than the downpayment, that are due before the balloon payment."

(A) Paying the balloon payment. If a retail installment contract contains a balloon payment that is the final payment, the contract must also provide the right for the retail buyer to pay the balloon payment. The model provision for paying the amount of the final scheduled balloon payment reads: "I can pay all I owe when the balloon payment is due and keep my motor vehicle."

(B) Balloon payment alternatives. If the retail installment contract contains the right for a retail buyer to refinance a balloon installment, the contract provision to refinance the installment must comply with either clause (i) or (ii) of this subparagraph. A contract under clause (ii) of this subparagraph must also contain the right of the retail buyer to sell the motor vehicle back to the holder or the retail seller.

(i) The model clause to describe a buyer's right to refinance a balloon installment under Texas Finance Code, §348.123(a), when applicable reads: "If I buy the motor vehicle primarily for personal, family, or household use, I can enter into a new written agreement to refinance the balloon payment when due without a refinancing fee. If I refinance the balloon payment, my periodic payments will not be larger or more often than the payments in this contract. The annual percentage rate in the new agreement will not be more than the Annual Percentage Rate in this contract. This provision does not apply if my Payment Schedule has been adjusted to my seasonal or irregular income."

(ii) If the contract contains a balloon payment and the seller intends Texas Finance Code, §348.123(b)(5) to apply to the contract:

(I) Special right to refinance balloon payment under Texas Finance Code, §348.123(b)(5)(B)(iii). The model clause reads: "I can enter into a new agreement to refinance my last installment if I am not in default. I can refinance at an annual percentage rate up to 5 points greater than the Annual Percentage Rate shown in this contract. The rate will not be more than applicable law allows. The new agreement will allow me to refinance the last installment for at least 24 months with equal monthly payments. You and I can also agree to refinance the last installment over another time period or on a different payment schedule."

(II) Repurchase option. If the contract includes a balloon payment, the creditor must draft a provision addressing the repurchase option.

(25) Agreement to keep motor vehicle insured. The model clause regarding agreement to keep the motor vehicle insured reads: "I agree to have physical damage insurance covering loss or damage to the motor vehicle for the term of this contract. The insurance must cover your interest in the vehicle." The creditor may include the following optional provision: "The insurance must include collision coverage and either comprehensive or fire, theft, and combined additional coverage."

(26) Creditor's right to purchase required insurance if buyer fails to keep motor vehicle insured. The model clause regarding agreement to allow the creditor to purchase required insurance if the buyer fails to keep the motor vehicle insured reads: "If I fail to give you proof that I have insurance, you may buy physical damage insurance. You may buy insurance that covers my interest and your interest in the motor vehicle, or you may buy insurance that covers your interest only. I will pay the premium for the insurance and a finance charge at the contract rate. If you obtain collateral protection insurance, you will mail notice to my last known address shown in your file."

(27) Physical damage insurance proceeds. The model clause regarding physical damage insurance proceeds reads: "I must use physical damage insurance proceeds to repair the motor vehicle, unless you agree otherwise in writing. However, if the motor vehicle is a total loss, I must use the insurance proceeds to pay what I owe you. I agree that you can use any proceeds from insurance to repair the motor vehicle, or you may reduce what I owe under this contract. If you apply insurance proceeds to the amount I owe, they will be applied to my payments in the reverse order of when they are due. If my insurance on the motor vehicle or credit insurance doesn't pay all I owe, I must pay what is still owed. Once all amounts owed under this contract are paid, any remaining proceeds will be paid to me."

(28) Returned insurance premiums and service contract charges. The contract may authorize a creditor to apply charges returned to the creditor for canceled insurance, service contract, and extended warranty charges to the buyer's obligation under the agreement as permitted by law, regardless of whether or not the buyer is in default under the contract.

(A) The model clause for contracts using the true daily earnings method reads: "If you get a refund on insurance or service contracts, or other contracts included in the cash price, you will subtract it from what I owe. Once all amounts owed under this contract are paid, any remaining refunds will be paid to me."

(B) For contracts using the scheduled installment earnings or sum of the periodic balances methods, the creditor may substitute the following clause: "If you get a refund of insurance or service contract charges, you will apply it and the unearned finance charges on it in the reverse order of the payments to as many of my payments as it will cover. Once all amounts owed under this contract are paid, any remaining refunds will be paid to me."

(29) Application of credits. The model clause regarding application of credits reads: "Any credit that reduces my debt will apply to my payments in the reverse order of when they are due, unless you decide to apply it to another part of my debt. The amount of the credit and all finance charge or interest on the credit will be applied to my payments in the reverse order of my payments."

(30) Transfer of rights. The seller does not have a duty to disclose the terms on which a contract or a balance under a contract is acquired, including any discount or difference between the rates,

charges, or balance under the contract and the rates, charges, or balance acquired as provided by Texas Finance Code, §348.301. The model clause regarding transfer of rights reads: "You may transfer this contract to another person. That person will then have all your rights, privileges, and remedies."

(31) Grant of security interest in collateral. The model clause regarding a description of a security interest granted in a typical motor vehicle installment sale reads:
Figure: 7 TAC §84.808(31) (No change.)

(32) Agreements regarding use and transfer of motor vehicle. The contract may contain a provision prohibiting a buyer from transferring any interest in the motor vehicle without the creditor's written permission, requiring the buyer to notify the seller of change of address, or prohibiting the removal of the motor vehicle from Texas. The transfer fee limitation establishes the maximum fee that a creditor could contract for, charge, or collect for transferring the buyer's equity in the motor vehicle to another party. If desired, a creditor may amend the model provision to reflect a lower transfer fee amount. The model clause concerning agreements regarding the use and transfer of the motor vehicle reads: "I will not sell or transfer the motor vehicle without your written permission. If I do sell or transfer the motor vehicle, this will not release me from my obligations under this contract, and you may charge me a transfer of equity fee of $25 ($50 for a heavy commercial vehicle). I will promptly tell you in writing if I change my address or the address where I keep the motor vehicle. I will not remove the motor vehicle (Optional: motor vehicle or other collateral) from Texas for more than 30 days unless I first get your written permission."

(33) Care of motor vehicle. The contract may obligate the buyer to keep the motor vehicle free of liens and encumbrances, require the buyer to keep the motor vehicle in good working order and repair, or prohibit the buyer from allowing the motor vehicle to be exposed to seizure, confiscation, or other involuntary transfer. The model clause regarding care of the motor vehicle reads: "I agree to keep the motor vehicle free from all liens and claims except those that secure this contract. I will timely pay all taxes, fines, or charges pertaining to the motor vehicle. I will keep the motor vehicle in good repair. I will not allow the motor vehicle to be seized or placed in jeopardy, or use it illegally. I must pay all I owe even if the motor vehicle is lost, damaged or destroyed. If a third party takes a lien or claim against or possession of the motor vehicle, you may pay the third party any cost required to free the motor vehicle from all liens or claims. You may immediately demand that I pay you the amount paid to the third party for the motor vehicle. If I do not pay this amount, you may repossess the motor vehicle and add that amount to the amount I owe. If you do not repossess the motor vehicle, you may still demand that I pay you, but you cannot compute a finance charge on this amount."

(34) Default rights and repossession provisions. This paragraph details agreements allowing acceleration of the buyer's obligation upon the buyer's default or upon the creditor's determination of insecurity as permitted by Texas Business and Commerce Code, §1.309. The following provisions are samples of model clauses regarding some of the default rights and remedies of a creditor in a typical motor vehicle installment sale transaction:

(A) Acceleration and default. The model clause regarding acceleration and default reads:
Figure: 7 TAC §84.808(34)(A) (No change.)

(B) Late charge. The model clause regarding late charge reads: "I will pay you a late charge as agreed to in this contract when it accrues."

(C) Repossession. At the creditor's option, a creditor may choose one of the following model provisions pertaining to repossession. The model clauses regarding repossession read:

(i) "If I default, you may repossess the motor vehicle from me if you do so peacefully. If any personal items are in the motor vehicle, you can store them for me and give me written notice at my last address shown on your records within 15 days of discovering that you have my personal items. If I do not ask for these items back within 31 days from the day you mail or deliver the notice to me, you may dispose of them as applicable law allows. Any accessory, equipment, or replacement part stays with the motor vehicle." In this provision, the term "peacefully" is intended to have the same meaning as "without breaching the peace," as determined by the Texas courts, and as found under clause (ii) of this subparagraph. Or

(ii) "If I default, you may repossess the motor vehicle from me if you do so without breaching the peace. If any personal items are in the motor vehicle, you can store them for me and give me written notice at my last address shown on your records within 15 days of discovering that you have my personal items. If I do not ask for these items back within 31 days from the day you mail or deliver the notice to me, you may dispose of them as applicable law allows. Any accessory, equipment, or replacement part stays with the motor vehicle."

(D) Buyer's right to redeem. The model clause regarding buyer's right to redeem reads: "If you take my motor vehicle, you will tell me how much I have to pay to get it back. If I do not pay you to get the motor vehicle back, you can sell it or take other action allowed by law. My right to redeem ends when the motor vehicle is sold or you have entered into a contract for sale or accepted the collateral as full or partial satisfaction of a contract."

(E) Disposition of motor vehicle. The model clause regarding disposition of the motor vehicle reads: "If I don't pay you to get the motor vehicle back, you can sell it or take other action allowed by law. You will send me notice at least 10 days before you sell it. You can use the money you get from selling it to pay allowed expenses and to reduce the amount I owe. Allowed expenses are expenses you pay as a direct result of taking the motor vehicle, holding it, preparing it for sale, and selling it. If any money is left, you will pay it to me unless you must pay it to someone else. If the money from the sale is not enough to pay all I owe, I must pay the rest of what I owe you plus interest. If you take or sell the motor vehicle, I will give you the certificate of title and any other document required by state law to record transfer of title."

(F) Collection costs. The model clause regarding collection costs reads: "If you hire an attorney who is not your employee to enforce this contract, I will pay reasonable attorney's fees and court costs as the applicable law allows."

(G) Cancellation of optional insurance or service contracts. The model clause regarding cancellation of optional insurance or service contracts reads: "This contract may contain charges for insurance or service contracts or for services included in the cash price. If I default, I agree that you can claim benefits under these contracts to the extent allowable, and terminate them to obtain refunds of unearned charges to reduce what I owe or repair the motor vehicle."

(35) Acceleration, waiver of notice of intent to accelerate, and notice of acceleration. A model clause regarding the holder's right to accelerate maturity of the contract and to waive the buyer's or co-buyer's common law right to notice of intent to accelerate, notice of acceleration, or both reads: "If I default, or you believe in good faith that I am not going to keep any of my promises, you can demand that I immediately pay all that I owe. You don't have to give me notice that

you are demanding or intend to demand immediate payment of all that I owe."

(36) Refund upon acceleration. For contracts using the sum of the periodic balances or scheduled installment earnings methods, the model clause regarding the buyer's right to a finance charge refund upon acceleration of the contract reads: "If you demand that I pay you all that I owe, you will give me a credit of part of the Finance Charge as if I had prepaid in full."

(37) Integration and severability.

(A) The contract may include an integration clause indicating that the parties to the contract intend it to be the final written expression of their agreement. The model clause regarding integration reads: "This contract contains the entire agreement between you and me relating to the sale and financing of the motor vehicle."

(B) The contract may also include a severability clause providing that the invalidity of any portion of the contract does not render invalid other parts of the contract that would otherwise be valid. The model clause regarding severability reads: "If any part of this contract is not valid, all other parts stay valid."

(38) No waiver and limitations on creditor's rights and usury savings.

(A) A model clause to prevent a creditor's delay in enforcing rights under the contract from affecting a waiver of those rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(B) A provision establishing limitations on the creditor's rights reads: "You will exercise all of your rights in a lawful way."

(C) The model clause regarding usury savings reads: "I don't have to pay finance charge or other amounts that are more than the law allows. This provision prevails over all other parts of this contract and over all your other acts."

(39) Applicable law. A model clause to establish the law that will apply to the contract reads: "Federal law and Texas law apply to this contract."

(40) Warranty disclaimer. The disclaimer of express and implied warranties should be set out from the surrounding text so that the disclosure is conspicuous. A disclaimer of express and implied warranties, such as the following, is permitted by Texas Business and Commerce Code, Article 2, Subchapter C, and reads: "Unless the seller makes a written warranty, or enters into a service contract within 90 days from the date of this contract, the seller makes no warranties, express or implied, on the motor vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose. This provision does not affect any warranties covering the motor vehicle that the motor vehicle manufacturer may provide."

(41) Preservation of consumer's claims and defenses notice. This notice only applies if the motor vehicle financed in the contract was purchased for personal, family, or household use. The preservation of consumer's claims and defenses notice disclosure should be set out from the surrounding text so that the disclosure is in all capitals, boldfaced and in at least 10-point type. The preservation of consumer's claims and defenses notice disclosure, as required by the Federal Trade Commission's preservation of consumer's claims and defenses notice, 16 C.F.R. §§433.1 *et seq.*, reads: "NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER. This provision applies to this contract only if the motor vehicle financed in the contract was purchased for personal, family, or household use."

(42) Used car buyer's guide. The used car buyer's guide disclosure should be set out from the surrounding text so that the disclosure is conspicuous. The disclosure should be prefaced by the words "In this box only, the word "you" refers to the Buyer." The used car buyer's guide disclosure, as required by the Federal Trade Commission's Used Car Regulation, 16 C.F.R. §§455.1 *et seq.*, reads:

(A) "Used Car Buyer's Guide. The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale."

(B) Spanish Translation: "Guía para compradors de vehículos usados. La información que ve en el formulario de la ventanilla para este vehículo forma parte del presente contrato. La información del formulario de la ventanilla deja sin efecto toda disposición en contrario contenida en el contrato de venta."

(43) Negotiability and assignment. The disclosure of the negotiability of the contract should be placed on the front side of the contract and may read:

(A) "The Annual Percentage Rate may be negotiated with the Seller. The Seller may assign this contract and retain its right to receive a part of the Finance Charge";

(B) "The rates of this contract are negotiable. The seller may assign or otherwise sell this contract and receive a discount or other payment for the difference between the rate, charges, or balance"; or

(C) "A customer may obtain their own financing. The finance charge may be negotiable. The dealership may assign the retail installment contract. There is no duty to disclose the terms for the sale of this contract (e.g., price paid to retail seller to purchase retail installment contract)."

§84.809. Permissible Changes.

(a) Creditors may make the following types of changes to the model clauses and the model contracts and may still be eligible for the defenses provided by Texas Finance Code, §349.101:

(1) Deleting inapplicable disclosures;

(2) Using a line for the consumer to initial, rather than a checkbox;

(3) Adding a signature line to the insurance disclosures to reflect joint policies;

(4) Substituting another term for "buyer," "seller," or "creditor" that has the same meaning, or use of pronouns such as "you," "we," and "us" or "it";

(5) Changing the person of the pronouns to refer to the seller as "I" or "me" and the buyer as "you" or "your";

(6) Substituting the word "vehicle" for the term "motor vehicle";

(7) Presenting the model clauses in any order, and combining or further segregating the model clauses;

(8) Inserting descriptive headings or number provisions;

(9) Changing the case of a word if otherwise permitted by the Texas Finance Code;

(10) Omitting references to different provisions for heavy commercial vehicles where the creditor elects to treat buyers of heavy commercial vehicles under the rules applicable to other vehicles;

(11) Moving provisions from one side of the form to the other and directing the buyer to see the other side, or placing all of the provisions on the same side of the form; or

(12) Changing any provision to comply with federal law.

(b) A sample model motor vehicle retail installment sales contract is presented in the following example.
Figure: 7 TAC §84.809(b)

(c) A contract may include other provisions that are not prohibited by law, but the other provisions must be submitted to the Office of Consumer Credit Commissioner for readability review before the creditor includes them.

(d) Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the buyer than those that would result from the use of a model clause.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
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For further information, please call: (512) 936-7621

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PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER A. GENERAL RULES

7 TAC §91.101

The Credit Union Commission (Commission) adopts amendments to §91.101, Definitions and Interpretations, with non-substantive changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4468). The amendments add six new definitions, modify three definitions, and delete two definitions. Appraisal, Finance Code, market value, pecuniary interest, real estate, and TAC are now defined in this section, while the definitions of core capital and corporate credit union have been deleted as no longer necessary. The definition of application has been expanded to include any request for approval to engage in any type of activity or operation. The catastrophic act definition was amended to include man-made disasters. Finally, the definition of a construction or development loan was modified to include loans for renovation or development of property already owned by the borrower if the renovation or construction changed the use of the property. As set out below, portions of the definition of appraisal have been deleted in response to comments. The deletion does not impose additional restrictions on credit union activities, nor does it add to credit unions' regulatory burden.

The amendments are adopted as a result of the Credit Union Department's general rule review. The Commission received written comments from Robert Campbell with the Texas Business Lenders Group, from Karen Wilkerson with United Heritage Credit Union, and from Suzanne Yashewski with Texas Credit Union League.

All three commenters objected to the language in the appraisal definition which excludes going concern value or special value to a specific user as part of the valuation. Commenters argued that this would place credit unions at a competitive disadvantage with other lenders and urged that eliminating that restriction would make the state charter more attractive. Two commenters also expressed concern that the language could cause confusion with leased fee derived valuations.

Initially, the Commission notes that the language in question did not impose a new restriction on credit unions; credit unions are currently prohibited from including going concern value or special value to a specific user in the valuation when evaluating the loan to value ratio. While the intent was to publicize the restriction, the Commission agrees that the restriction would be addressed more appropriately elsewhere, such as in §91.709 (Member Business Loans) or in a Regulatory Bulletin. Accordingly, that language has been deleted.

Additionally, two commenters questioned how the definition would affect "drive-by appraisals". A "drive-by appraisal" is never acceptable when an appraisal is required. Credit unions are free to use "drive-by" appraisals if no appraisal is required.

Finally, with reference to the restriction on including going concern value, one commenter suggested allowing credit unions to request a waiver of this restriction. Credit unions already have the ability to request a waiver of this or other limits under §91.709(n).

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code.

The specific section affected by the amended rule is Texas Finance Code, §15.402.

§91.101. Definitions and Interpretations.

(a) Words and terms used in this chapter that are defined in Finance Code §121.002, have the same meanings as defined in the Finance Code. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--the Texas Credit Union Act (Texas Finance Code, Subtitle D).

(2) Allowance for loan and lease losses (ALLL)--a general valuation allowance that has been established through charges against earnings to absorb losses on loans and lease financing receivables. An ALLL excludes the regular reserve and special reserves.

(3) Applicant--an individual or credit union that has submitted an application to the commissioner.

(4) Application--a written request filed by an applicant with the department seeking approval to engage in various credit union activities, transactions, and operations or to obtain other relief for

which the commission is authorized by the act to issue a final decision or order subject to judicial review.

(5) Appraisal--a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of a specifically described asset as of a specific date, supported by the presentation and analysis of relevant market information.

(6) Automated teller machine (ATM)--an automated, unstaffed credit union facility owned by or operated exclusively for the credit union at which deposits are received, cash dispensed, or money lent.

(7) Catastrophic act--any natural or man-made disaster such as a flood, tornado, earthquake, major fire or other disaster resulting in physical destruction or damage.

(8) Community of interest--a unifying factor among persons that by virtue of its existence, facilitates the successful organization of a new credit union or promotes economic viability of an existing credit union. The types of community of interest currently recognized are:

(A) Occupational--based on an employment relationship that may be established by:

(i) employment (or a long term contractual relationship equivalent to employment) by a single employer, affiliated employers or employers under common ownership with at least a 10% ownership interest;

(ii) employment or attendance at a school; or

(iii) employment in the same trade, industry or profession (TIP) with a close nexus and narrow commonality of interest, which is geographically limited.

(B) Associational--based on groups consisting primarily of natural persons whose members participate in activities developing common loyalties, mutual benefits, or mutual interests. In determining whether a group has an associational community of interest, the commissioner shall consider the totality of the circumstances, which include:

(i) whether the members pay dues,

(ii) whether the members participate in furtherance of the goals of the association,

(iii) whether the members have voting rights,

(iv) whether there is a membership list,

(v) whether the association sponsors activities,

(vi) what the association's membership eligibility requirements are, and

(vii) the frequency of meetings. Associations formed primarily to qualify for credit union membership and associations based on client or customer relationships, do not have a sufficient associational community of interest.

(C) Geographic--based on a clearly defined and specific geographic area where persons have common interests and/or interact. More than one credit union may share the same geographic community of interest. There are currently four types of affinity on which a geographic community of interest can be based: persons, who

(i) live in,

(ii) worship in,

(iii) attend school in, or

(iv) work in that community. The geographic community of interest requirements are met if the area to be served is in a recognized single political jurisdiction, e.g., a city or a county, or a portion thereof.

(D) Other--The commissioner may authorize other types of community of interest, if the commissioner determines that either a credit union or foreign credit union has sufficiently demonstrated that a proposed factor creates an identifiable affinity among the persons within the proposed group. Such a factor shall be well-defined, have a geographic definition, and may not circumvent any limitation or restriction imposed on one of the other enumerated types.

(9) Construction or development loan--a financing arrangement for acquiring property or rights to property, including land or structures, with the intent of converting the property into income-producing property such as residential housing for rental or sale; commercial use; industrial use; or similar use. Construction or development loan includes a financing arrangement for the major renovation or development of property already owned by the borrower that will convert the property to income-producing property or convert the use of income-producing property to a different or expanded use from its former use. Construction or development loan does not include loans to finance maintenance, repairs, or improvements to an existing income-producing property that do not change its use.

(10) Day--whenever periods of time are specified in this title in days, calendar days are intended. When the day, or the last day fixed by statute or under this title for taking any action falls on Saturday, Sunday, or a state holiday, the action may be taken on the next succeeding day which is not a Saturday, Sunday, or a state holiday.

(11) Department newsletter--the monthly publication that serves as an official notice of all applications, and by which procedures to protest applications are described.

(12) Field of membership (FOM)--refers to the totality of persons a credit union may accept as members. The FOM may consist of one group, several groups with a related community of interest, or several unrelated groups with each having its own community of interest.

(13) Finance Code or Texas Finance Code--the codification of the Texas statutes governing financial institutions, financial businesses, and related financial services, including the regulations and supervision of credit unions.

(14) Imminent danger of insolvency--a circumstance or condition in which a credit union is unable or lacks the means to meet its current obligations as they come due in the regular and ordinary course of business, even if the value of its assets exceeds its liabilities; or the credit union has a positive net worth ratio equal to two percent or less of its assets.

(15) Improved residential property--real property consisting of a residential dwelling having one to four dwelling units, at least one of which is occupied by the owner of the property. This term shall also include a one to four unit dwelling occupied in whole or in part by the owner on a seasonal basis.

(16) Indirect financing--a program in which a credit union makes the credit decision in a transaction where the credit is extended by the vendor and assigned to the credit union or a loan transaction that generally involves substantial participation in and origination of the transaction by a vendor.

(17) Loan-to-value ratio--the aggregate amount of all sums borrowed including outstanding balances plus any unfunded commit-

ment or line of credit from all sources on an item of collateral divided by the market value of the collateral used to secure the loan.

(18) Loan and extension of credit--a direct or indirect advance of funds to a member, or on that member's behalf, that is conditioned upon the repayment of the funds by the member or the application of collateral. The terminology also includes the purchase of a member's loan or other obligation, a lease financing transaction, a credit sale, a line of credit or loan commitment under which the credit union is contractually obligated to advance funds to or on behalf of a member, an advance of funds to honor a check or share draft drawn on the credit union by a member, or any other indebtedness not classified as an investment security.

(19) Manufactured home--a HUD-code manufactured home as defined by the Texas Manufactured Housing Standards Act. The terminology may also include a mobile home, house trailer, or similar recreational vehicle if the unit will be used as the member's residence and the loan is secured by a first lien on the unit, and the unit meets the requirements for the home mortgage interest deduction under the Internal Revenue Code (26 U.S.C. Section 163(a), (h)(2)(D)).

(20) Market Value--the most probable price which an asset should bring in a competitive and open market under an arm's-length sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of ownership from seller to buyer where:

(A) Buyer and seller are typically motivated;

(B) Both parties are well informed or well advised, and acting in their own best interests;

(C) A reasonable time is allowed for exposure in the open market;

(D) Payment is made in cash in U.S. dollars or in terms of financial arrangements comparable thereto; and

(E) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

(21) Metropolitan Statistical Area (MSA)--a geographic area as defined by the director of the U.S. Office of Management and Budget.

(22) Mobile office--a branch office that does not have a single, permanent site, including a vehicle that travels to various public locations to enable members to conduct their credit union business.

(23) Office--includes any service facility or place of business established by a credit union at which deposits are received, checks or share drafts paid, or money lent. This definition includes a credit union owned branch, a mobile branch, an office operated on a regularly scheduled weekly basis, a credit union owned ATM, or a credit union owned electronic facility that meets, at a minimum, these requirements; however, it does not include the credit union's Internet website. This definition also includes a shared branch or a shared branch network if either:

(A) the credit union has an ownership interest in the service facility either directly or through a CUSO or similar organization; or

(B) the service facility is local to the credit union and the credit union is an authorized participant in the service center.

(24) Overlap--the situation which exists when a group of persons is eligible for membership in two or more state, foreign, or federal credit unions doing business in this state. Notwithstanding this provision, no overlap exists if eligibility for credit union membership results solely from a family relationship.

(25) Pecuniary interest--the opportunity, directly or indirectly, to make money on or share in any profit or benefit derived from a transaction.

(26) Person--an individual, partnership, corporation, association, government, governmental subdivision or agency, business trust, estate, trust, or any other public or private entity.

(27) Principal office--the home office of a credit union.

(28) Protestant--a credit union that opposes or objects to the relief requested by an applicant.

(29) Real estate or real property--an identified parcel or tract of land. The term includes improvements, easements, rights of way, undivided or future interest and similar rights in a tract of land, but does not include mineral rights, timber rights, growing crops, water rights and similar interests severable from the land when the transaction does not involve the associated parcel or tract of land.

(30) Remote service facility--an automated, unstaffed credit union facility owned or operated by, or operated for, the credit union, such as an automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility, at which deposits are received, cash dispensed, or money lent.

(31) Reserves--allocations of retained earnings including regular and special reserves, except for any allowances for loan, lease or investment losses.

(32) Resident of this state--a person physically located in, living in or employed in the state of Texas.

(33) Respondent--a credit union or other person against whom a disciplinary proceeding is directed by the department.

(34) Shared service center--a facility which is connected electronically with two or more credit unions so as to permit the facility, through personnel at the facility and the electronic connection, to provide a credit union member at the facility the same credit union services that the credit union member could lawfully obtain at the principal office of the member's credit union.

(35) Secured credit--a loan made or extension of credit given upon an assignment of an interest in collateral pursuant to applicable state laws so as to make the enforcement or promise more certain than the mere personal obligation of the debtor or promisor. Any assignment may include an interest in personal property or real property or a combination thereof.

(36) TAC--an acronym for the Texas Administrative Code, a compilation of all state agency rules in Texas.

(37) Title or 7 TAC--Title 7, Part 6 of the Texas Administrative Code Banking and Securities, which contains all of the department's rules.

(38) Underserved area--a geographic area, which could be described as one or more contiguous metropolitan statistical areas (MSA) or one or more contiguous political subdivisions, including counties, cities, and towns, that satisfy any one of the following criteria:

(A) A majority of the residents earn less than 80 percent of the average for all wage earners as established by the U.S. Bureau of Labor Statistics;

(B) The annual household income for a majority of the residents falls at or below 80 percent of the median household income for the State of Texas, or the nation, whichever is higher; or

(C) The commission makes a determination that the lack of available or adequate financial services has adversely effected economic development within the specified area.

(39) Uninsured membership share--funds paid into a credit union by a member that constitute uninsured capital under conditions established by the credit union and agreed to by the member including possible reduction under §122.105 of the act, risk of loss through operations, or other forfeiture. Such funds shall be considered an interest in the capital of the credit union upon liquidation, merger, or conversion.

(40) Unsecured credit--a loan or extension of credit based solely upon the general credit financial standing of the borrower. The term shall include loans or other extensions of credit supported by the signature of a co-maker, guarantor, or endorser.

(b) The same rules of construction that apply to interpretation of Texas statutes and codes, the definitions in the Act and in Government Code §2001.003, and the definitions in subsection (a) of this section govern the interpretation of this title. If any section of this title is found to conflict with an applicable and controlling provision of other state or federal law, the section involved shall be void to the extent of the conflict without affecting the validity of the rest of this title.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904696
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: November 8, 2009
Proposal publication date: July 3, 2009
For further information, please call: (512) 837-9236

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7 TAC §91.103

The Credit Union Commission (Commission) adopts amendments to §91.103, Public Notice of Department Activities, without changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4471). The amendments rename the rule to Public Notice of Department Decisions, and further add applications for conversion of a credit union's certificate of incorporation and conversion to a mutual savings institution to the types of applications covered by the rule.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments with respect to these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §15.4021, which directs the Commission to adopt rules providing for public notice of department activities, and §122.005, which directs the Commission to adopt rules for providing public notice of applications.

The specific sections affected by the amended rule are Texas Finance Code, §15.4021 and §122.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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7 TAC §91.104

The Credit Union Commission (Commission) adopts amendments to §91.104, Notice of Applications, without changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4471). The amendments rename the rule to Public Notice and Comment on Certain Applications, and add an application for conversion to a mutual savings institution to the types of applications covered by the rule.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments with respect to these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §15.4021, which directs the Commission to adopt rules providing for public notice of department activities, and §122.005, which directs the Commission to adopt rules for providing public notice of applications.

The specific sections affected by the amended rule are Texas Finance Code, §15.4021 and §122.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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7 TAC §91.105

The Credit Union Commission (Commission) adopts amendments to §91.105, Application for Authorization from the Commissioner, without changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4472). The amendments rename the rule Acceptance of Other Application Forms and revise the language of the rule for clarity.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments with respect to these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §§122.001, 122.011, 122.156, which govern applications submitted to the Commissioner for approval.

The specific sections affected by the amended rule are Texas Finance Code, §§122.001, 122.011, 122.156.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. ORGANIZATION PROCEDURES

7 TAC §91.201

The Credit Union Commission (Commission) adopts amendments to §91.201, Incorporation Procedures, without changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4472). The amendments add a requirement that the applicants discuss their strategy for securing share and deposit insurance for its members' accounts, and specify that the applicants provide the pro forma financial information in a quarterly format. The amendments also make a grammatical change and correct a typographical error.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments with respect to these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §122.001, which permits the Commission to prescribe the form for an application for incorporation and under §122.004 which permits the commissioner to investigate and obtain information concerning applications for incorporation.

The specific sections affected by the amended rule are Texas Finance Code, §122.001 and §122.004.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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7 TAC §91.202

The Credit Union Commission adopts amendments to §91.202, Form of Bylaws; Amendments to Articles of Incorporation and Bylaws, without changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4473). The amendments change the name of the rule to Bylaw and Articles of Incorporation Amendments, delete duplicative language, and make conforming amendments to titles of other proposed rules being amended concurrently.

The amendments are adopted as a result of the Credit Union Department's general rule review. The Commission received no comments with respect to these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §122.011, which sets out the procedure for amending articles of incorporation or bylaws.

The specific section affected by the amended rule is Texas Finance Code, §122.011.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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7 TAC §91.203

The Credit Union Commission (Commission) adopts new §91.203, Share and Deposit Insurance Requirements, without changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4474). The proposed new

rule moves §91.1110 from Subchapter J to Subchapter B with virtually identical text.

The new rule is adopted as a result of the Credit Union Department's general rule review which determined that the rule should be relocated.

The Commission received no comments with respect to the new rule.

The new rule is adopted under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under §15.410, which requires the Commission to adopt, and the commissioner to enforce, rules requiring credit unions to provide share and deposit insurance for members and depositors.

The specific section affected by the new rule is Texas Finance Code, §15.410.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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7 TAC §91.205

The Credit Union Commission (Commission) adopts amendments to §91.205, Use of Credit Union Name, without changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4474). The amendments change the name of the rule to Credit Union Name and make grammatical and technical changes to the rule.

The amendments are adopted as a result of the Credit Union Department's general rule review. The Commission received no comments with respect to the amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §122.003, which requires credit unions to use only names approved by the commissioner.

The specific section affected by the amended rule is Texas Finance Code, §122.003.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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7 TAC §91.206

The Credit Union Commission (Commission) adopts amendments to §91.206, Underserved Area Credit Unions--Secondary Capital Accounts, without changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4475). The amendments make non-substantive grammatical and technical changes.

The amendments are adopted as a result of the Credit Union Department's general rule review. The Commission received no comments with respect to the amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §122.014, which permits the Commission to adopt rules for the organization and operation of underserved area credit unions.

The specific section affected by the amended rule is Texas Finance Code, §122.014.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. MEMBERS

7 TAC §91.310

The Credit Union Commission (Commission) adopts new §91.310, Annual Report to Membership, with non-substantive changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4476). The new rule sets out the contents of the annual report that must be provided to members. The report must contain information such as the names and terms of office of the directors, and names of advisory directors, a description of changes in senior management, bylaws and articles of incorporation, financial condition and operating results, membership size, and services, as well as a summary of the most recent audit. The rule also provides that if the credit union maintains a website, the report must be posted on the website. Credit unions that do not have a website must distribute the report to their members at the annual meeting and must notify

members that copies of the report are available on request. The rule has been modified, as described below, to clarify or omit certain requirements and to insert a missing word. The changes do not impose additional requirements on credit unions nor do they add to credit unions' regulatory burden.

The new rule is adopted as a result of legislation passed with the review of the Credit Union Department by the Sunset Commission. The Commission received written comments from John Lederer with Credit Union of Texas, from Karen Wilkerson with United Heritage Credit Union, from David Frazier with Community Resource Credit Union, and from Melodie Stegall with the Credit Union Legislative Coalition.

All four commenters objected to the requirement to disclose the names of the advisory directors, arguing that the disclosure is not required by the statute and that the advisory directors do not vote on board matters. The Commission notes that the purpose of the new statute was to increase transparency in credit union operations and management for its members. In that spirit, and as directed by §15.4105(a)(5), the Commission believes that disclosing the names of advisory directors is necessary to ensure credit union members are provided with basic knowledge of credit unions' financial condition and management. Advisory directors have access to confidential credit union information and to board deliberations, and, in some cases, can be paid. Credit unions should be willing to disclose the names of the individuals with that type of access to credit union affairs.

Three commenters asked to have the term "senior management" clarified, stating that it could be different for each credit union. In response, the Commission has drawn from §91.719(c), and added a new subsection (c) which defines senior management staff. One commenter suggested that credit unions list changes in membership structure, rather than providing names of employees in management. The Commission does not believe that listing changes in management structure would comply with the intent of the statute. Another commenter expressed privacy concerns in disclosing names of its senior management. The Commission notes that the rule applies only to changes during the year. There is no requirement to list employees if there has been no change. The Commission also notes that most of the employees required to be listed under this rule are already reported publicly in the Form 990, so the rule should not add any privacy concerns.

Three commenters asked that the rule require description of changes in membership size, as stated in the statute, rather than changes to the field of membership. Since changes to the field of membership must be reported under subsection (b)(3)(B) when describing changes to the bylaws, the Commission has amended this language as the commenters suggested. The Commission also amended that same subsection to remove references to "new" services to align it with the statutory language.

The same three commenters noted some confusion in the period of time covered by a "current" balance sheet. To clarify, the Commission has simplified subsection (b)(3) to state "since the last report" and has rewritten (b)(4) to require a balance sheet and income/expense statement for the prior year. The Commission notes that the bylaws require the credit union to either post or make available a monthly balance sheet, so current financial information is already required to be available at all times to members.

All commenters objected to the requirement that the annual report include a summary of the most recent audit since credit unions are required (by §122.102 and §91.516) to provide that at the annual meeting. While the Commission believes a summary of the audit would be an appropriate part of the annual report and that there would be very little additional burden to add it to the annual report, it agrees that it is available through other means. Consequently, the Commission has deleted that requirement.

One commenter expressed concern at providing the required information on its public website and suggested credit unions be permitted to limit the information to members only. Making the report available on the credit union's website is a statutory requirement that cannot be waived by the Commission. Restricting access to the report to members only, while not prohibited by the statute, would need to be strictly scrutinized to be sure the members have easy and complete access to the report.

Finally, a commenter felt that subsection (a) was awkwardly worded and did not specify how a credit union should give notice. That commenter suggested that the Commission allow a credit union to give electronic notice. While electronic notice may be appropriate in some cases, it may not be applicable or necessary in this case, where the credit union does not have a website. The alternate language suggested by the commenter omits the requirement for credit unions without a website to distribute the report at the annual meeting. The commenter further believes that members are interested primarily in the safety of their money and will not be interested in the additional information required by this rule. While this may be the case, the statute requires this information be provided to members.

The new rule is adopted under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under §15.4105, which directs the Commission to adopt rules requiring a credit union to provide an annual report to members.

The specific section affected by the new rule is Texas Finance Code, §15.4105.

§91.310. Annual Report to Membership.

(a) Every credit union shall provide to its membership an annual written report, as prescribed below. The report must be updated before the credit union's annual meeting and shall be available on the credit union's website throughout the year. Any credit union that does not maintain a website shall distribute the report at its annual meeting and must notify members at least annually that copies of the report are available upon request.

(b) The annual report shall cover the credit union's operations during the preceding calendar year and shall contain, at a minimum, the following information:

(1) the names and dates of expiration of the terms of office for each director on the credit union's board;

(2) the names of any honorary or advisory directors appointed by the board;

(3) a brief description of any changes, since the last report, to the credit union's:

(A) senior management staff;

(B) bylaws or articles of incorporation;

(C) financial condition and operating results;

(D) membership size and services offered; and

(4) the credit union's year end balance sheet and income/expense statement.

(c) For purposes of this rule, senior management staff shall include the chief executive officer, any assistant chief executive officers, including any vice-presidents and above, and the chief financial officer.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Harold E. Feeney
Commissioner
Credit Union Department
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7 TAC §91.315

The Credit Union Commission (Commission) adopts new §91.315, Members' Access to Credit Union Documents, with non-substantive changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4476). The new rule requires credit unions to provide members with notice that certain documents related to the credit union's finances and management are available. The rule also specifies the frequency and methods that a credit union must use to provide the notice to its members, and itemizes the information that must be included in the notice. The rule has been modified, as described below, to omit one requirement. The change does not impose additional requirements on credit unions nor does it add to credit unions' regulatory burden.

The new rule is adopted as a result of legislation passed with the review of the Credit Union Department by the Sunset Commission. The Commission received written comments from John Lederer with Credit Union of Texas, from Karen Wilkerson with United Heritage Credit Union, from David Frazier with Community Resource Credit Union, and from Melodie Stegall with the Credit Union Legislative Coalition.

Three commenters objected to including the annual report in the notice requirement, stating that the statute did not require credit unions to give notice that the report is available. Although the Commission does not believe this addition is burdensome, particularly since the report must be posted on the credit union's website, it has deleted that requirement. Another commenter argued that including the audit summary in the notice duplicates the requirements of §91.310. Since §122.107 specifically includes the audit summary, the Commission cannot waive the requirement but notes that it has deleted the requirement to include the summary in the annual report under §91.310.

Similarly, two commenters disagreed with giving notice of written board policy as described in subsection (c)(3) as not required by the statute. Admittedly, the statute does not specifically require notice of these policies, but §4.01(b) of the Standard Bylaws for State Chartered Credit Unions requires the board of directors to establish "written policies regarding members' access to the articles of incorporation, bylaws, rules, guidelines, board policies, and copies thereof." The Commission believes that it is pointless for a board to establish these policies if the member is not aware they are available. Additionally, the same bylaw provision specifically provides that articles of incorporation and bylaws shall be made available to members. Rather than lengthening the list of available documents in this rule, however, the Commission opted, under the authority of §122.107(a)(4) to summarize the notice requirement in subsection (c)(3). Credit unions should already have these policies in place, so adding this item to the list of available documents should not increase their burden.

The commenters additionally requested clarification of the terms "rules and guidelines" and expressed concern that credit unions will be subjected to fishing expeditions. One commenter questioned the reasoning behind encouraging actions that will result in higher expenses to credit unions at a time when they are being encouraged to keep expenses down. Since this rule merely reflects requirements of current statutes, rules, and bylaws, the Commission does not believe that the promulgation of this rule adds to the credit union regulatory burden. The Commission declines to define the terms rules and guidelines, as those are terms boards should have defined as part of the policies they have established. Nor does the Commission believe that by complying with existing requirements for providing information to members, a credit union will be subjected to a fishing expedition.

Finally, a commenter stated that the rule overlaps with §91.310, is redundant, and contains excessive notice requirements. The commenter specifically notes the requirement to put the notice both on the website and in the newsletter twice a year. The commenter proposes, as an alternative, that the notice be given one time when an account is opened or posted in the lobby, in addition to the website. The requirement to put the notice on the website as well as in the newsletter twice a year is statutory and cannot be waived by the Commission, nor can the Commission substitute an alternate method except for those who do not maintain a website or distribute a newsletter. For those credit unions, however, the Commission has modified the requirement that the credit union include the notice with each member's account statement. The rule now requires the credit union to include the notice at least semiannually with each member's account statement. This change puts these credit unions on a par with credit unions who distribute a newsletter.

The same commenter suggests the Commission allow notice delivery methods such as electronic notice or inclusion in the account agreement. While those methods would be appropriate in some cases, credit unions that have websites or newsletters must comply with the methods indicated by the statute. Electronic notice delivery would probably not be suitable for credit unions with no website, while inclusion in the account agreement would not meet the frequency indicated by the statute. The commenter also believes that the members are more interested in low loan rates, high dividend rates, insured funds, and personal service. While this may be correct, the observation does not affect the statutory requirement to provide the notice to members that certain documents are available.

The new rule is adopted under the provisions of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under §122.107, which directs the Commission to adopt rules for credit unions to provide notice to members of the availability of certain documents.

The specific section affected by the new rule is Texas Finance Code, §122.107.

§91.315. Members' Access to Credit Union Documents.

(a) Required Notice. Every credit union shall provide notice to its membership of the availability of certain documents related to the credit union's finances and management.

(b) Delivery of Required Notice. A credit union shall post a copy of the required notice on its website throughout the year. The notice required by this section shall be published in the credit union's newsletter twice a year. If a credit union does not maintain a website and distribute a newsletter at least semiannually, the credit union shall provide the notice at least semiannually with each member's account statement.

(c) Documents Available to Members. Upon request, a member is entitled to review or receive a copy of the most recent version of the following credit union documents:

(1) balance sheet and income statement (the non-confidential pages of the latest call report may be given to meet this requirement);

(2) a summary of the most recent annual audit completed in accordance with §91.516 of this chapter (relating to Audits and Verifications);

(3) written board policy regarding access to the articles of incorporation, bylaws, rules, guidelines, board policies, and copies thereof; and

(4) Internal Revenue Service Form 990.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. RESERVES AND DIVIDENDS

7 TAC §91.901

The Credit Union Commission (Commission) adopts amendments to §91.901, Reserve Requirements, without changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4477). The amendments add a provision allowing a credit union to reduce the amount transferred to reserves if the Commissioner approves. The amendments also make grammatical and technical changes to conform with other rules and for clarity.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments with respect to the amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §122.104, which directs the commission to establish rules requiring a credit union to contribute to and maintain net worth reserves necessary to protect the interests of its members.

The specific section affected by the amended rule is Texas Finance Code, §122.104.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER J. CHANGES IN CORPORATE STATUS

7 TAC §91.1003

The Credit Union Commission (Commission) adopts amendments to §91.1003, Mergers/Consolidations, without changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4478). The amendments replace the terms "surviving" and "merging" with "acquirer" and "acquiree" to conform to the terminology used by the Financial Accounting Standards Board. The amendments also update references to the Hart-Scott-Rodino Act.

The amendments are adopted as a result of the Credit Union Department's general rule review. The Commission received no comments with respect to the amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §122.156, which sets out the requirements for rules adopted for mergers or consolidations.

The specific section affected by the amended rule is Texas Finance Code, §122.156.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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7 TAC §91.1110

The Credit Union Commission (Commission) adopts the repeal of §91.1110, Share and Deposit Insurance Requirements, without changes to the text published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4479). The Commission has moved the rule to Subchapter B and renumbered it §91.203.

The rule is repealed as a result of the Credit Union Department's proposal to move the rule to a new location.

The Commission received no comments with respect to the amendments.

The repeal is adopted under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under §15.410, which requires the Commission to adopt, and the commissioner to enforce, rules requiring credit unions to provide share and deposit insurance for members and depositors.

The specific section affected by the repeal is Texas Finance Code, §15.410.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER H. ELECTRICAL PLANNING

DIVISION 1. RENEWABLE ENERGY RESOURCES AND USE OF NATURAL GAS

16 TAC §25.174

The Public Utility Commission of Texas (commission) adopts amendments to §25.174, relating to Competitive Renewable Energy Zones, with changes to the proposed text as published in the July 17, 2009, issue of the *Texas Register* (34 TexReg 4712). The amendments implement Public Utility Regulatory Act (PURA) §39.904(g), which directs the commission to consider the level of financial commitment by renewable generators for each Competitive Renewable Energy Zone (CREZ) in determining whether to grant a certificate of convenience and necessity (CCN). The amendments address the level of financial commitment that renewable generators must satisfy before the commission will process the CCN applications for transmission facilities to serve certain CREZs previously designated by the commission, and delete language that would be inconsistent with the changes resulting from the amendment.

The commission finds that installed generating capacity, continuing construction of new generation, and signed interconnection agreements are the best measures of wind-generator financial commitment. The commission adopts a test that includes these standards to evaluate whether renewable generators have demonstrated sufficient financial commitment to warrant the approval of CCNs for the CREZ transmission facilities identified in Docket Number 33672. For the three southern CREZs, McCamey, Central, and Central West, the amount of renewable generation already developed in those CREZs, the amount of additional renewable generation currently under development, and the renewable capacity represented by signed interconnection agreements demonstrate that sufficient financial commitments have been made for those zones. The commission concludes that renewable generators have provided sufficient information in this proceeding that new generation development has or will occur to use the new transmission lines built to these CREZs. In reaching this conclusion, the commission has relied on data available from the Electric Reliability Council of Texas (ERCOT) about installed renewable generation and signed interconnection agreements. In Docket Number 33672, the commission designated the McCamey, Central, and West Central zones as CREZs with generation capacities of 1859, 3047, and 1063 megawatts (MWs), respectively, along with new transmission facilities necessary to transport the output of the designated generation. As of June 1, 2009, capacity represented by installed renewable generation and interconnection agreements in those three CREZs already totaled 1206, 6208, and 1728 MWs respectively.

For the CREZs for which sufficient information concerning financial commitments has not yet been provided, wind generators have the opportunity, in a proceeding that takes place after the adoption of the amendment, to either provide evidence that they meet the test described above or to demonstrate financial commitment by posting collateral. There is evidence that, without collateral postings, the test described above cannot be met with respect to the two CREZs in the Texas Panhandle, Panhandle A and Panhandle B. Unless additional commitments are made for these CREZs, collateral will have to be posted before the commission can determine that the CCNs filings should proceed. Under the amended rule, renewable generators interested in building renewable projects in those two zones will have to post security deposits or other collateral of $15,350 per MW of capacity corresponding to their planned projects, or $10,000 per MW if the capacity is supported by appropriate leasing agreements. If the sum of the capacity represented by completed projects, projects under construction, signed interconnection agreements and collateral is at least 50% of the designated capacity for a CREZ, the

financial commitment requirement will be deemed to be met for that CREZ. The security deposits are refundable when a renewable generator signs an interconnection agreement with a Transmission Service Provider (TSP) designated to build transmission facilities in the relevant CREZ but would be forfeited to the TSP if the generator does not sign an interconnection agreement. An interconnection agreement with a TSP is a major milestone in the development of a generation project.

This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). The amendments to §25.174 are adopted under Project Number 34577.

The commission received numerous comments and reply comments on the proposed amendments to §25.174. Initial comments were submitted by: CPV Renewable Energy Company, LLC, CPV Rattlesnake Den Renewable Energy Company, LLC, and CPV Steele Hill Renewable Energy Company, LLC (collectively CPV), Lone Star Transmission, LLC (Lone Star), Steering Committee of Cities Served by Oncor (Oncor Cities), NRG Texas (NRG), City of Austin d/b/a/ Austin Energy (Austin Energy), Texas Industrial Energy Consumers (TIEC), E.ON Climate & Renewables North America, Inc. (E.ON), Horizon Wind Energy LLC (Horizon), Penn Real Estate Group, Ltd. (Penn), Oncor Electric Delivery Company, LLC (Oncor), Shell WindEnergy, Inc. (Shell), Iberdrola Renewables, Inc. (Iberdrola), Electric Transmission Texas, LLC (ETT), Eurus Energy America Corporation (Eurus), Sharyland Utilities, LP (Sharyland), Cross Texas Transmission, LLC (Cross Texas), Reliant Energy Retail Services, LLC, and Reliant Energy Texas Retail, LLC (collectively Reliant), Invenergy Wind North America, LLC (Invenergy), Luminant Energy Company, LLC and Luminant Generation Company, LLC (collectively Luminant), CPS Energy (CPS), the Electric Reliability Council of Texas, Inc. (ERCOT), Third Planet Windpower, LLC (TPW), Higher Power Energy (HPE), NextEra Energy Resources, LLC (NextEra), Cielo Wind Services, Inc. (Cielo), RES America Developments, Inc. (RES America), AES Wind Generation, Inc. (AES), B.N.B. Renewable Energy, LLC (BNB), and Longfellow Ranch Partners, LP (Longfellow Ranch).

Reply comments were filed by Worldwide Energy, Inc. (Worldwide Energy), Longfellow Ranch, Austin Energy, Denton Municipal Electric (DME), Oncor Cities, Lone Star, Eurus, Pattern Renewables, LP (Pattern Renewables), Horizon, John Deere Wind Energy (Deere), Oncor, E.ON, TIEC, ETT, Sharyland, the Lower Colorado River Authority (LCRA), Cross Texas, RES America, ERCOT, PSEG Texas, LP (PSEG Texas), NextEra, Invenergy, Iberdrola, AES, Shell, Duke Energy Corporation (Duke Energy), and CPS.

A public hearing was held on August 11, 2009. No parties offered comments on the rule directly. However, several parties responded to clarifying questions by the commission staff. Sharyland inquired whether the language in proposed subsection (d)(5) regarding the purchase of surface rights included leases and other site control instruments and suggested it be clarified. Iberdrola also commented on the site control language and favored language proposed by E.ON. TIEC commented that limitations should be placed on the CCNs issued for CREZ transmission lines so that if a transmission utility proposes to modify the line and its transfer capacity the financial commitment requirement should be harmonized with the changed transfer capability. Horizon commented on the forms of collateral, suggesting that the use of a parental guarantee be permitted. ERCOT requested that, in the event the commission decides that collateral should be posted with ERCOT, such collateral be posted in a form that would allow its existing processes to be used, with no fiduciary responsibility for ERCOT.

Preamble Question on Collateral

In the preamble of the proposal for publication, the commission posed a series of interrelated questions regarding the potential value and importance of requiring wind generators to post collateral as a means of ensuring wind energy development sufficient to use the transmission lines built to the CREZs. The commission asked the following questions:

Should a requirement that renewable energy developers post a security deposit be added to any tier of the proposed three-tier test to establish financial commitment in the Panhandle CREZs? If so, how should the amount be determined? What procedure should govern the posting of the deposit? Should the deposit be posted with ERCOT or with a TSP designated to build transmission facilities in or to the Panhandle CREZs? What event should trigger a return of the deposit?

On September 24, 2009, the commission invited additional comments on the appropriate amount of security deposit to be posted as collateral and the methodology used to support the proposed amount. The notice indicated that interested persons could file comments within four calendar days, or by September 28, 2009. In response to that notice, additional comments were received from E.ON, Invenergy, Horizon, Eurus, Third Planet, Higher Power, Shell, Horizon, Fremantle Energy, Luminant, TIEC, Oncor Cities, RES America, Cielo, Iberdrola, and Cross Texas. A summary of these comments is included within the discussion of initial and reply comments below. The commission response also responds to the supplemental comments.

Summary of Comments and Commission Responses

TSP Proposal for Modifications to the Transmission Improvements in CREZ Order

CPS suggested requiring that a TSP that proposes a modification to the transmission improvements described in the CREZ Order file an application with the commission. The application should be reviewed by ERCOT to determine whether the proposed modifications would reduce the cost of transmission or increase the amount of generating capacity that transmission improvements for the CREZ can accommodate. In reply comments, NextEra disagreed, stating that, in addition to imperiling the CREZ transmission certification schedule already approved by the commission, CPS's proposal is contrary to PURA §39.151(d), which requires that ERCOT actions be subject to review and oversight of the commission. TIEC commented that it is essential for transmission providers to be reasonably restricted as to the project costs and scope and proposed that the rule include a provision that a cost cap be established in each CCN proceeding and CREZ providers be held within a reasonable cost range of the level contemplated in Docket Number 35665. In reply comments, Oncor, Lone Star and NextEra responded that TIEC's and CPS's proposed changes are beyond the scope of the rule amendments the commission is considering. In reply comments, E.ON emphasized that the commission should limit the scope of the proceeding to the financial commitment necessary for approval of CREZ CCNs. In reply comments, NextEra argued that it is appropriate that the commission, in a CCN case, review any proposed change by a TSP that may reduce transmission costs or increase the amount of generating capacity that CREZ transmission can accommodate because the commission addressed transmission facilities and plans in general terms in Docket Number 33672 with the goal of addressing and review-

ing the details of the transmission plans in a subsequent CCN proceeding.

TIEC also noted that if a TSP is allowed to modify or expand the scope of a project, the commission will have to take steps to ensure that additional generating capacity will materialize in the CREZ to justify the increased scope of the transmission project. In its reply comments, TIEC further clarified its initial comments regarding limitation on transmission project expansions, stating that the rule should contain standards to limit capacity expansions to only those that do not increase costs. TIEC also recommended that the commission not approve an expanded scope unless it will be justified by additional generation beyond that already contemplated and approved by the commission.

In reply comments, Deere Wind disagreed with any suggestions to limit the scope, arguing that allowing the transmission capacity to be increased in the CCN proceedings is the best tool to avoid excess CREZ development.

In reply comments, Lone Star disagreed with TIEC's proposal to cap the cost of transmission lines, adding that the commission need not cap costs through this rule because it has many tools available to help it manage CREZ costs, and no additional mechanism is required. Lone Star noted that actual transmission costs may in fact deviate from the cost estimates in the CREZ Transmission Optimization Study (CTO study) as the study is now two-years old and was based on simplifications regarding routing constraints that could underestimate line lengths. In addition, changing technology, inflation, weather, and vendor costs could all affect costs. In reply comments, Sharyland and Cross Texas had similar comments, adding that a TSP will be required to show that its costs were prudently incurred when it seeks to recover its costs on a particular project in a rate case. In reply comments, ETT added that expecting precise engineering estimates even before the final route is selected is unreasonable.

Commission Response

The commission agrees with TIEC and CPS that cost containment is very important. However, the commission also agrees with Oncor, Lone Star and NextEra that TIEC's and CPS's proposed changes are beyond the scope of this rule. The commission also agrees with NextEra that it is more appropriate for the commission to address issues related to changes that may reduce transmission costs or increase the amount of generating capacity proposed by a TSP in a CCN case.

Financial Commitment Requirement for Granting CREZ CCNs

Luminant, citing PURA §39.904(g)(3), and E.ON, took the position that the commission must consider the level of financial commitment by renewable generators in evaluating whether to process the CCN applications. TIEC also thought that additional evidence of financial commitment was appropriate before the CCNs for the Panhandle CREZ transmission lines are approved. Horizon had a different interpretation of the statute, contending that because the commission has already determined that there was sufficient financial commitment for CREZ designation, there is no need for a separate methodology to grant the CCNs. Horizon concluded that the previously established level of financial commitment, if reaffirmed in affidavits by the CREZ developers at the time the CCNs are filed, should be sufficient to support the granting of the CCNs. In reply comments, Oncor Cities disagreed, stating that such affidavits may indicate good intentions on the part of the developers, but are not sufficient to secure the expenditures of billions of dollars by ratepayers.

Commission Response

The commission disagrees with Horizon and agrees with Luminant, E.ON, and Oncor Cities that the financial commitments deemed sufficient for CREZ designation are insufficient and additional evidence of financial commitment is necessary before the CREZ CCNs can be approved.

Financial Commitment Requirement in the McCamey, Central and Central West CREZs

CPS, Invenergy, AES, Luminant, E.ON, and Cielo agreed that investment already made in the McCamey, Central and Central West CREZs in the form of existing generation or generation under construction is sufficient evidence of financial commitment for these CREZs. Shell and Horizon did not oppose this determination. Lone Star agreed but limited its comments to the Central CREZ, stating that no additional financial commitment is needed in the Central CREZ. In reply comments, Invenergy supported E.ON and RES America's suggestion that signed interconnection agreements be considered along with existing generation and proposed generation for the southern CREZs as a strong indication of financial commitment. In reply comments, E.ON advocated the application of the tier framework to all CREZs, including the southern CREZs, to provide a forum to confirm that those CREZs meet Tier 1.

Oncor Cities contended that the commission has not provided sufficient factual analysis to support the decision that existing generation and generation under construction provide adequate financial commitment in the McCamey, Central and Central West CREZs to grant CCN applications. Oncor Cities would not completely exempt those projects from the 10% collateral requirement, especially because it is refundable under the current rule, although they would agree to reduce it. Oncor Cities perceived risks that could result in CREZ lines being under-utilized in the three zones. They included in those risks the possibility that some capacity could be diverted to other regions, for example the Southwest Power Pool (SPP) or the Western Electricity Coordinating Council (WECC), while the CREZ buildout proceeds; and the possibility that the wind developers might build their own private transmission facilities to connect to the ERCOT system. They also mentioned the possibility that wind projects might not be economic once the production tax credit is terminated, which will happen soon for some of the older projects. Based on these considerations, Oncor Cities urged the commission to maintain a collateral requirement in the three southern CREZs. In its reply comments, AES disagreed and contended that the financial commitment in the southern CREZs is a settled issue. AES stated that, as demonstrated in Horizon's initial comments, there is currently an excess supply of wind generation in the southern CREZs, and that installed generation and generation currently under construction in the three southern CREZs provide sufficient financial commitment for the approval of CCNs related to these CREZs. AES refuted Oncor Cities' claims regarding the risks to ratepayers in the absence of a collateral requirement for the southern CREZs, pointing out that ratepayers are currently harmed by congestion that the CREZ transmission facilities, especially the priority projects, were intended to relieve. In its reply comments, NextEra also disagreed with Oncor Cities and opined that, given the high levels of operational wind generation in the southern CREZs, additional collateral is unnecessary and should not be required. However, if the commission were to approve a meaningful dispatch priority mechanism for which only projects supported by collateral are eligible, NextEra would want its projects to be eligible to provide collateral and

to qualify for such dispatch priority mechanism. In reply comments, Horizon pointed out that the planned transmission facilities in the southern CREZs will be oversubscribed by 50% when completed, which demonstrates that there will be sufficient wind generation to support the planned transmission facilities, therefore additional financial commitment requirements would needlessly constrain financial resources that would be better utilized for project development.

Commission Response

The commission believes that there is already sufficient evidence of financial commitment in the southern CREZs as demonstrated by existing construction, projects under construction, and signed interconnection agreements, to approve the CCNs for those CREZs. The commission agrees with Horizon and other commenters that, if all planned projects in the southern CREZs are completed, the southern CREZs will be oversubscribed, and that the CREZ lines and priority lines are needed to relieve congestion that already exists in those zones. The commission disagrees with Oncor Cities that a substantial risk exists that the CREZ lines in those three zones will be under-utilized. The possibility that some capacity could be diverted to other regions, as stated by Oncor Cities, appears extremely unlikely at this time given the absence of transmission lines or planned transmission projects that would be required to transport the wind energy from the southern CREZs to those regions. Similarly, the possibility that the wind developers might build their own private transmission facilities to connect to the ERCOT system and transport their wind-generated energy outside the congested West zone, as NextEra has done, appears unlikely. In both cases, building transmission facilities over such extended distances represents an extraordinary investment that would only be justified if a generator expected congestion in the West zone to cause a significant price difference between the West zone and the other regions or zones. But such expectations could only be fulfilled if the CREZ transmission lines were oversubscribed causing frequent congestion, in which case there would not be any stranded investment costs to ratepayers. The commission notes that Oncor Cities have not provided any tangible information or data that would support either scenario.

Methodology for Evaluating Financial Commitment

Horizon rejected the proposed three-tiered approach to determine the financial commitment of Panhandle wind developers. Horizon disapproved of the proposed Tier 1 because, it contended, the Legislature intended that some measure less than actual construction would suffice as financial commitment from wind generators. Horizon disagreed with the proposed Tier 2's reliance on signed interconnection agreements as evidence of financial commitment, contending that two of the TSPs that would be called upon to sign these agreements were still in the start-up phase and would not have sufficient resources in place to negotiate and sign such agreements. However, Horizon agreed that the application for interconnection agreements with a TSP in Tier 3 could be considered as evidence of financial commitment.

In reply comments, Horizon commented that because the transmission plan selected by the commission is an integrated plan that has been optimized for the locations and projected levels of generation specified in Docket Number 33672, consideration of the financial commitment for CCNs to implement the plan should also be determined on an integrated basis. According to Horizon, when viewed in this manner, financial commitment for all of the CCNs, including those for the Panhandle CREZs, has already been established.

Commission Response

The commission disagrees with Horizon. To the extent that Horizon's view of the legislative intent is correct, the commission is adopting a standard that is consistent with that intent because the proposed test can be satisfied without a demonstration of need for 100% of the CREZ transmission facilities for which a CNN is sought. The commission also disagrees that an application for interconnection agreement is firm enough to be considered evidence of financial commitment in lieu of a completed interconnection agreement for the purpose of the CREZ CCNs. An application for interconnection may be made without the generator having a clear indication of the challenges associated with interconnecting a project at the site it has identified. A signed interconnection agreement indicates that the generator has committed more resources to funding and participating in the required transmission studies and has a clear idea of what it will take to interconnect the project. The commission believes that this higher level of resource commitment is appropriate before a CCN may be issued. Finally, the commission disagrees with Horizon's contention that the financial commitment has already been established for approval of the CCNs for the Panhandle CREZs. The commission believes that the evidence provided by wind developers in Docket Number 33672 regarding their intention to build wind generation projects was adequate for CREZ geographic designation, but insufficient to justify the approval of CREZ line CCNs. The commission concludes that it is important to have an additional level of protection for customers at the CCN stage beyond the financial commitments that were considered in designating the CREZs.

Invenergy, RES America, Eurus, Sharyland, ETT, Iberdrola, E.ON, Cielo, Higher Power, Third Planet, and ETT supported the tiered methodology and agreed that it is an objective way for the commission to evaluate and recognize the strength of existing financial commitments.

Oncor Cities contended that the tiered methodology failed to protect ratepayers. They argued that the standards in Tier 1 had the same shortcomings as they noted for the southern CREZs. The standards proposed in Tiers 2 and 3 were deemed by Oncor Cities to be even less reliable as indicators of financial commitment, whether they rely on contracts or lease agreements. In Tier 3, Oncor Cities contended that the interconnection agreement application standard demonstrated no commitment at all. In conclusion, Oncor Cities urged the commission to maintain the collateral requirement before approving the construction of lines for CREZ wind development. In reply comments, TIEC shared the concerns expressed by Oncor Cities about the tiered methodology and repeated its recommendation to replace Tiers 2 and 3 with a security deposit requirement to offset some of the risks identified by Oncor Cities.

Luminant proposed that the commission retain Tier 1 with a few clarifications, as existing or nearly completed development is the best demonstration of financial commitment, but eliminate proposed Tiers 2 and 3 as drafted and replace them with a new Tier 2 requirement for developers in a CREZ that does not satisfy Tier 1 to post collateral. Luminant opined that taken as a whole, the Tier 2 and 3 standards are subjective and imprecise and do not provide reliable or easily measurable evidence of financial commitment, adding that attempted showings under these standards could be subject to challenge. In reply comments, TIEC agreed with Luminant that the Tier 2 and 3 criteria should be replaced with a simple collateral deposit requirement.

Commission Response

The commission disagrees with Invenergy, RES America, Eurus, Sharyland, ETT, Iberdrola, E.ON, Cielo, Higher Power, Third Planet, and ETT and agrees with Oncor Cities, Luminant, and TIEC that Tiers 2 and 3 in the proposed rule should be eliminated as options in the financial commitment test because the standards they include either cannot be met in the Panhandle CREZs or do not provide the assurance the commission is seeking. The commission is retaining the two standards proposed in Tier 1 with the addition of signed interconnection agreements as a third standard to be considered in the financial commitment test, and with the addition of a fourth standard giving wind developers the option to post collateral if they cannot meet any of the first three standards of the financial commitment test, as recommended by Luminant and TIEC. If the sum of the renewable generating capacity represented by completed renewable generation projects, projects under construction, projects for which an interconnection agreement has been signed, and collateral deposits is at least 50% of the designated generating capacity for a CREZ, the financial commitment requirement will be deemed satisfied for that CREZ. The commission modifies subsection (d) accordingly.

Luminant would modify subsection (d)(5)(ii) relating to generating projects under construction to specify that the project would have to be operational within six months from the date of the first CCN filing for the CREZ, and to add examples of specific non-qualitative evidence that the developers must present to establish that their projects will actually be operational within that six-month period. For example, Luminant recommended that the commission require evidence that the wind turbines needed for the project will be delivered within 30 days of the filing of the CCN application; that they subsequently are delivered; that a construction contractor has been hired; that preliminary site work has begun; and that the project financing has closed.

NextEra recommended a change to the "generation under construction" standard in Tier 1. NextEra would replace the requirement that such project be operational within six months with a requirement that the project have an interconnection agreement and be operational within 12 months of completion of the transmission facility within the relevant CREZ. NextEra believed this change to be necessary because a Panhandle project will not be able to connect to the ERCOT grid until after the transmission lines of the Panhandle CREZ become operational, and it would be unreasonable to require that the project be completed and sit idle until the transmission lines are built. In reply comments, Invenergy supported NextEra's recommendation to change the Tier 1 six-month project completion requirement to 12 months.

Commission Response

The commission partially agrees with Luminant regarding the generation projects under construction standard. The commission decides that such projects should be counted toward the determination of financial commitment if the project is on schedule to be completed within six months of the final order in the financial commitment proceeding. The commission modifies the rule to accept, as evidence of project under construction, documentation showing that the preliminary site work has begun, a construction contractor has been hired, the project financing has closed, or similar evidence of progress in the completion of the project.

The commission rejects the recommendation presented by NextEra and supported by Invenergy to accept as proof of financial commitment a planned project with operational date as late as 12 months after completion of the transmission facility within the relevant CREZ. Such a standard would fail to provide any assurance that the project will be built at the time when the commission is considering whether the financial commitment is sufficient to approve the CCN application.

E.ON recommended signed interconnection agreements as an additional standard firm enough to be considered in Tier 1. In reply comments, Invenergy supported this proposal, stating that evidence filed by ERCOT in Docket Number 33672 shows projects with signed interconnections are likely to be placed in service.

Commission Response

The commission agrees with E.ON and Invenergy that a signed interconnection agreement is evidence of firm commitment to build and should be included in the financial commitment test. The commission modifies the financial commitment test by adding signed interconnection agreements as a standard to be considered along with completed projects and planned projects under construction to provide evidence of financial commitment in a CREZ. The commission modifies subsection (d) accordingly.

NextEra recommended replacing the "application for interconnection agreement" standard in Tier 3 with a "request for full interconnection study," or similar language, as the former is not defined, but the latter is a defined step in the Generation Interconnection Process of the ERCOT Regional Planning Group Charter and Procedures. E.ON supported NextEra's recommendation in its reply comments.

Commission Response

The commission disagrees with NextEra and E.ON as it considers a request for full interconnection study to be insufficient evidence of a financial commitment to build a project and declines to include this standard in the financial commitment test.

RES America proposed to modify Tier 2 to include "development activities for planned expansion of existing facility with application for an interconnection agreement" as evidence of financial commitment and likelihood of completion. Invenergy proposed that, in the event the tier test is substantially met, the commission consider additional factors such as the developer's previous experience with wind developments in ERCOT; whether a project is an expansion of an existing project; and the level of investment already made in the proposed wind project. These additional criteria, Invenergy said, would give the commission more flexibility in the event a CREZ falls just short of the subsection (d)(5) criteria. Sharyland, however, opposed the addition of further criteria, especially subjective criteria, as they could delay the financial commitment proceedings and interfere with the timely processing of the CCN applications. In reply comments, E.ON agreed with Invenergy's proposal for a "back-up" provision in the event a CREZ does not meet the standards. However, in reply comments, E.ON also agreed with the many commenters, including Sharyland, who stressed the importance of readily applied, objective criteria to minimize disputes that could delay the proceedings.

Commission Response

The commission agrees with RES America that "development activities for planned expansion of existing facility with application for an interconnection agreement" may show some level of commitment, but much would depend on the nature and level of activities. The commission finds this wording too vague to be evidence of financial commitment and declines to add this standard

in the financial commitment test. The commission agrees with Invenergy that, in the event the financial commitment test is substantially met, the commission may decide, based on other considerations, that the financial commitment has sufficiently been met. However, the commission declines to adopt the additional criteria offered by Invenergy and prefers to leave open the list of additional criteria that it may consider in such situation.

RES America and Iberdrola proposed to modify the language referring to the acquisition of surface rights to include leases in subsection (d)(5)(B) and (C); Sharyland, E.ON, and Cielo also proposed to clarify and expand the types of site control instruments that will be accepted under Tiers 2 and 3. These commenters contended that the current language seems to require that developers purchase or lease acreage outright for at least 20 years, which is not industry practice. E.ON proposed that leases negotiated for a shorter term with option to extend for 20 years be accepted as the standard. Shell had a similar proposal. In reply comments, Sharyland, RES America, Horizon and Iberdola agreed with E.ON's proposal. Shell and Iberdrola believed that their acreage under lease option demonstrates an enormous financial commitment that will assist the commission in approving the CCNs. Iberdrola pointed out the self-defeating nature of a situation in which the commission is unwilling to approve the CCNs for the Panhandle CREZs transmission lines without evidence of firm commitments such as contracts for land rights that cannot be terminated, and the developers consider it too risky to make this kind of irreversible commitment unless the CCNs are approved. Horizon had similar comments. In reply comments, Oncor Cities did not dispute the practice by wind developers to initially execute short-term leases, but argued that this in fact substantiated Oncor Cities' position that such instruments make it easier for developers to change course and therefore do not constitute financial commitments.

Commission Response

The commission observes that the current standard in Tiers 2 and 3 of the proposed rule that relies on a developer's purchase or lease of acreage for a period of 20 years or more cannot be met as it does not represent industry practice. The commission declines to accept the recommendation of RES America, Sharyland, E.ON, Cielo, Horizon, and Iberdrola that the surface rights standard be modified to include short-term leases and agrees with Oncor Cities that such instruments do not constitute firm financial commitments. The commission instead concludes that Tiers 2 and 3 in the proposed rule cannot be met and therefore decides to remove them from the financial commitment test. The commission modifies subsection (d) accordingly. The commission agrees, however, with RES America, Sharyland, E.ON, Cielo, Horizon, and Iberdrola that lease agreements have some demonstrable value in calculating financial commitment. The commission will, therefore, consider leasing agreements with landowners that convey a right or option for a period of at least 20 years to develop and operate a renewable energy project in determining the amount of collateral that must be posted.

In reply comments, E.ON recommended counting installed generation and planned projects in a tier if they are "located in one or more counties that lie in whole or in part" within a CREZ.

Commission Response

The commission agrees that a project or planned project under construction located in one or more counties that lie in whole or in part within a CREZ may be counted toward the financial commitment for that CREZ, provided that a project counted in one CREZ not be counted again in another CREZ when a county spans more than one CREZ.

E.ON suggested that the proposed rule be revised to allow non-renewable generation development in the Panhandle to be considered in determining financial commitment. In reply comments, Sharyland and Cross Texas supported E.ON's proposal.

Commission Response

The commission disagrees with E.ON that non-renewable generation projects should be considered in determining the financial commitment necessary for the approval of CREZ line CCNs and declines to incorporate this change in the rule. The commission points out that PURA §39.904(g)(2) specifies that the commission "shall develop a plan to construct transmission capacity necessary to deliver to electric customers . . . the electric output from renewable energy technologies in the competitive renewable energy zones."

Whether a Collateral Posting is Necessary to Demonstrate Financial Commitment

Oncor Cities urged the commission to maintain a collateral requirement for the three southern CREZs. In reply comments, NextEra disagreed and argued that operational wind generation connected to the ERCOT grid should not have to post collateral because such generation already provides the highest and most secure form of collateral. Given the high level of operational generation in the southern CREZs, NextEra added, additional collateral is unnecessary and should not be required.

BNB agreed that elimination of the collateral requirement for the Central West CREZ is justified. BNB limited its comments to the Central West CREZ because it has development interests in that zone only.

Commission Response

The commission disagrees with Oncor Cities and declines to maintain a collateral requirement for the three southern CREZs. The commission agrees with NextEra that, given the high level of operational generation and generation in advanced stages of development in the southern CREZs, the financial commitment for those CREZs is met and additional collateral is unnecessary.

Regarding the Panhandle CREZs, Oncor Cities contended that the risk to ratepayers of having to fund under-utilized transmission lines is even higher than in the southern CREZs, and urged the commission to continue to require a security deposit for these projects, either in conjunction with or in replacement of the tiered methodology set out in the proposed rule.

If the commission were to implement a security deposit, E.ON suggested it should apply to the weaker financial commitments of Tiers 2 and 3. Invenergy proposed that it be added as a requirement that complements Tier 3 and required of only those MWs that cannot otherwise fulfill the criteria listed in Tier 3. Luminant would replace Tiers 2 and 3, which it considers too weak, with a 10% security deposit.

TIEC believed that the completed projects, projects under construction, and projects with signed interconnection agreement in Tiers 1 and 2 provide sufficient proof of commitment. However, TIEC continued, other planned capacity that counts toward the Tier 2 and 3 requirements represent weaker commitment from developers and may justify additional requirements to ensure that the CREZ lines will be fully utilized.

Shell commented that it would be hard for Panhandle developers to meet any of the tiers in the three-tiered test proposed in the amendments to the rule, and proposed adding a collateral posting option for the Panhandle in the CREZ Rule to supplement the financial commitment evidence that the commission needs to approve the CREZ transmission CCN applications. In reply comments, Sharyland agreed with Shell and favored retaining the collateral as a "fall-back" option that would allow developers unable to meet the financial commitment for a particular CREZ under the three-tiered approach to nevertheless show that financial commitment exists by posting collateral. In reply comments, Cross Texas stated that if collateral were to be deemed necessary to provide evidence of financial commitment, it would support Shell's proposal. In reply comments, Oncor Cities agreed with Shell that the tiered test provides inadequate certainty, but did not agree that the collateral should be just an additional posting option. Instead, Oncor Cities would add a collateral at all three levels of the tiered test. In reply comments, ETT reiterated that it does not take a position on a collateral requirement; however, ETT agreed with Shell that a collateral posting should be an option for demonstrating financial commitment. ETT commented that if a collateral requirement or option is added, any collateral should secure all affected CREZ lines, not just those to which the generator interconnects.

BNB, CPS, Invenergy, RES America, Eurus, E.ON, Iberdrola, Cielo, Horizon, Longfellow Ranch, and Third Planet opined that a collateral posting is not required to satisfy the financial commitment showing for approval of a CCN. RES America argued that it could be a deterrent to investment and may have anticompetitive consequences if the collateral requirement could be met with a guarantee from a corporate parent. Iberdrola argued that the 10% collateral requirement contained in existing subsection (c)(6), if adopted, would tie up resources better invested more productively. Cielo and RES America agreed, and in addition RES America pointed out that a security deposit does not guarantee a project's completion if the project is determined to be uneconomic. NextEra would not add a security deposit or collateral in the rule.

Eurus qualified its opposition to a collateral requirement by saying that it would support such a requirement if it were the only way to ensure that the financial commitment necessary for the approval of CCNs for the Panhandle CREZ lines are met, so as to remove the uncertainty surrounding the transport of wind energy from the Panhandle into the load centers in ERCOT. Iberdrola had a similar comment, but qualified it by saying that any deposit scheme should be narrowly tailored in both scope and duration, and should aim to supplement the types of financial commitment evidence allowable under each tier. Higher Power opposed a security deposit requirement in addition to the tier tests. However, it would agree to a security deposit in lieu of a current tier requirement. For example, instead of an application for an interconnection agreement in Tier 3, the wind developer could provide a security deposit that would be a percentage of the cost of a finalized interconnection agreement.

Cielo and RES America would accept a collateral requirement if it was linked to dispatch priority. Horizon and NextEra made a similar suggestion in reply comments.

Invenergy and E.ON suggested the security deposit not be required of existing generation or proposed projects with an interconnection agreement and a letter of credit already posted with a TSP. In addition, in reply comments, Invenergy recommended that, if collateral is required, it should be required for only those MWs that are not supported by financial commitment evidence as set forth in subsection (d)(5).

Commission Response

The commission disagrees with BNB, CPS, Invenergy, RES America, Eurus, E.ON, Iberdrola, Cielo, Horizon, Longfellow Ranch, and Third Planet that a collateral posting is not required to satisfy the financial commitment showing for approval of a CCN. The commission agrees with Luminant and TIEC that completed projects, projects under construction, and projects with signed interconnection agreements provide sufficient proof of commitment, but that other standards listed under Tiers 2 and 3 in the proposed rule either are not firm enough as noted by Luminant, TIEC, and Oncor Cities, or cannot be met in the Panhandle CREZs as noted by Shell and Sharyland. The commission concurs with those commenters' conclusion that a collateral posting option is needed as part of the financial commitment evidence that the commission needs to approve the CREZ transmission CCN applications, and therefore adds a collateral option to the financial commitment test. The commission agrees with Invenergy and E.ON that collateral should not be required in CREZs where sufficient financial commitment is deemed to exist based on existing projects, projects under construction, and interconnection agreements. The commission disagrees with Cielo, RES America, Horizon, and NextEra that collateral should be linked to dispatch priority because the purpose of the collateral posting is to justify the building of transmission lines that will benefit wind developers. Any consideration of dispatch priority should occur only at a time when there is evidence of excess development that cannot be resolved by market forces.

In reply comments, Horizon suggested that the amount of letter of credit or parental guarantee submitted as collateral should be used as a credit or offset to the amount of deposit that is required pursuant to an interconnection agreement with a TSP because they serve the same purpose.

Commission Response

The commission disagrees with Horizon that the amount submitted as collateral should be used as a credit or offset to the amount of deposit that is required pursuant to an interconnection agreement with a TSP. The collateral requirement is intended to ensure that the developers' generation projects will be built once the transmission lines are built, whereas the interconnection agreement deposits are intended to secure the interconnection facilities and serve a very different purpose. Therefore the commission concludes that they cannot be treated as interchangeable. However, the rule has been amended to provide a refund of collateral after an interconnection agreement is signed and collateral required by the TSP has been posted in recognition of a new level of commitment being made by wind developers.

Procedure Regarding a Collateral Requirement

Allowable Forms of Collateral Requirement

ERCOT had no position on the collateral requirement. However, if the commission were to require that wind developers deposit a collateral with ERCOT, ERCOT recommended that it be in the form of letters of credit or cash and requested that the commission describe acceptable forms of letters of credit. In reply comments, Invenergy and Horizon stated that, in addition to letters of credit and cash, other forms of collateral such as parental guarantees should be permitted. NextEra recommended letters of credit, guarantees by a parent company with an investment

grade rating, and other forms of collateral approved by the commission as acceptable forms of collateral. In its reply comments, ERCOT clarified that it does not object to holding corporate guarantees as collateral, so long as it can require the depositor to change the collateral form if the credit worthiness of the guarantor becomes questionable.

Commission Response

The commission agrees that the collateral should be in the form of letters of credit or cash as proposed by ERCOT, or corporate guarantees as suggested by Invenergy, Horizon, and NextEra. If the collateral is in the form of corporate guarantee, the commission agrees to require the depositor to change the collateral form if the credit worthiness of the guarantor becomes questionable, as recommended by ERCOT. The commission modifies the rule to specify as much. The commission is aware that requiring a depositor to change the collateral form if the credit worthiness of the guarantor becomes questionable or if the guarantor files for bankruptcy may not be easily achievable, and that an enforcement mechanism may have to be put in place to ensure the security deposits will be maintained.

What should be the Amount of Collateral Requirement

Invenergy and E.ON argue that the security deposit should be an amount of no more than $5,000 to $10,000 per MW, and it should not be required of existing generation or proposed projects with an interconnection agreement and a letter of credit already posted with a TSP. Luminant would tie the deposit to the cost of the transmission facilities, which would include all of the transmission lines and substations (minus default and priority facilities) that interconnect within the Panhandle CREZs; those that deliver renewable energy from the Panhandle CREZs to the Metroplex area; and those that connect the Panhandle CREZs to the Central CREZs. Luminant calculated a security deposit of $30,708 per MW of installed or planned capacity, based on the costs estimated in ERCOT's CREZ Transmission Optimization Study divided by the total new CREZ wind generating capacity for the two Panhandle CREZs. Although not opposing a collateral requirement, in reply comments Pattern Renewables opposed the Luminant proposal because the amount is too large and results in an excessive capital drain on the developers, which could disadvantage them compared to other developers of generation, both wind and non-wind. In reply comments, Invenergy, Horizon, and E.ON noted that Luminant's suggested collateral amount exceeds the $25,000 per MW collateral requirement that was rejected in the original CREZ rulemaking proceeding as too onerous for small developers. E.ON contended that Luminant's proposal would impose a substantial burden on Panhandle developers that would create a major barrier to entry for small developers and could jeopardize the commission's integrated CREZ transmission plan. According to E.ON, Luminant's proposal goes beyond the requirement in PURA §39.904(g)(3), which requires the commission to consider the level of financial commitment but does not mandate substantial security deposits made years in advance from individual generators. In reply comments, Iberdrola commented that the Luminant proposal is excessive and favors a collateral posting of $5,000 to $10,000, as suggested by E.ON. Deere Wind also replied to comments regarding any collateral requirement by arguing that a collateral requirement, if included in the rule, should be reasonable and a parental guarantee should be an acceptable form of collateral.

In supplemental comments, commenters proposed collateral amounts ranging from $0.00 to $30,708 per MW of planned capacity. E.ON and Invenergy based their proposal for a collateral amount on the transmission cost they estimated for the Panhandle CREZs divided by the total MW capacity for which collateral would need to be posted to obtain a per MW amount, to which they applied a factor of 5%. These parties estimated the Panhandle CREZ cost to be $1.38 billion, lower than the estimates obtained by Luminant and Cross Texas. This is because, in calculating their estimated costs of the Panhandle CREZ improvements, they reasoned that because collateral is posted for new wind projects, they needed only to account for those lines that are most likely to benefit new wind projects in the Panhandle/South Plains region. E.ON and Invenergy recommended applying a factor of 5% to the per MW estimated transmission cost related to the Panhandle CREZs as reasonable because the commission chooses not to adopt a dispatch priority mechanism at this time. Based on these assumptions and calculations, E.ON and Invenergy proposed an amount of no more than $12,354/MW to be posted as collateral.

In supplemental comments, Iberdrola, Higher Power, Third Planet, and Eurus concurred with the collateral amount recommended by E.ON and Invenergy. Eurus commented that the amount of $12,354/MW is within the range for the collateral amounts that have been proposed in this proceeding and represents a substantial sum given the considerable investment dollars that must otherwise be raised and expended to bring a wind project to completion.

Although RES America does not support the imposition of a collateral requirement that is unaccompanied by any assurance of a dispatch priority mechanism, in supplemental comments it recommended that the collateral should be no higher than $5,000/MW.

In supplemental comments, Cross Texas calculated a collateral amount of approximately $4,500 per MW based on an assumption of a monthly revenue requirement of $25 million on a total Panhandle transmission cost of $1.5 billion. Cielo recommended a deposit amount of $25,000 per MW based on the ERCOT estimated cost of the entire CREZ transmission build out divided by the ERCOT estimated added transfer capability.

In supplemental comments, Luminant reiterated its proposal for a collateral requirement of $30,708 per MW of installed or planned capacity based on a factor of 10% to be applied to the estimated transmission costs for the Panhandle CREZs and assuming the collateral is required for 100% of the 5,584 MW capacity approved for the Panhandle CREZs. Luminant noted that if the threshold for meeting the revised financial commitment test was dropped to 50% of the approved capacity in the Panhandle CREZs, the factor applied to the transmission cost amount would in effect be reduced from 10% to 5%, bringing the effective collateral amount to $15,354 per MW (50% of the $30,708 per MW recommended by Luminant). Luminant had concerns that a collateral requirement of less than 10% of the entire Panhandle transmission investment may be insufficient to provide assurance to ratepayers that developers would complete their projects and that the transmission investment would be used and useful. TIEC and Oncor Cities supported Luminant's proposal for a collateral requirement of $30,708/MW. TIEC noted that Luminant's proposal is consistent with the 10% pro rata requirement in the existing CREZ rule.

In supplemental comments, Shell, Horizon, and Fremantle Energy strongly opposed the imposition of a collateral requirement if the commission is not inclined to grant dispatch priority protection. They asserted that, without dispatch priority, the appropri-

ate amount of security deposit from Panhandle CREZ developers should be $0.00 per MW.

Commission Response

The commission agrees that a collateral requirement of $30,708 per MW as proposed by Luminant exceeds the $25,000 per MW collateral requirement that was rejected in the original CREZ rulemaking proceeding as too onerous for small developers, as pointed out by E.ON, Invenergy, and Horizon. However, the commission finds that the assumptions used by Luminant to arrive at this number are reasonable and the methodology appropriate. The commission finds that, using the transmission cost per MW arrived at by Luminant and applying a 5% factor as proposed by E.ON, Invenergy and other wind developers brings the collateral amount to $15,350 per MW of planned project capacity. The commission believes that this number is reasonable and within the range of the proposals that were submitted. The commission also finds that it is reasonable to apply a factor of 5% as opposed to the 10% factor in the current rule because the rule now adds a collateral requirement that is unaccompanied by any assurance of a dispatch priority mechanism, as pointed out by AES. The commission therefore adopts $15,350 per MW as the collateral to be deposited by wind developers with planned projects in the Panhandle CREZs. However, if the capacity is supported by a lease agreement that conveys a right or option for a period of at least 20 years to develop and operate a renewable energy project, the commission decides that the collateral amount should be reduced to $10,000 per MW, based on a conversion factor of 60 acres per MW for a wind energy project. With this combined option, the commission recognizes that existing lease agreements represent some level of financial commitment by wind developers that, when complemented with a collateral deposit, is firm enough for the commission to rely upon.

Regarding the presumption that 60 acres of land represent one MW of wind development, Cielo pointed out that this number will vary depending on the land's topography and the capacity of the turbine, and suggested adding in the rule that the presumption can be varied with evidentiary support.

Commission Response

The commission agrees that project by project, the land needed for each megawatt will vary. However, the commission adopts 60 acres per MW as the conversion factor to be used in conjunction with the posting of a reduced collateral as it is a reasonable estimate that will avoid the need for evidentiary determination for each project.

When should the Collateral be Posted, and When should it be Returned

Invenergy and E.ON proposed that the collateral be made in tranches. Invenergy suggested that 25% of the total deposit be made within 45 days of the filing of the first CCN with subsequent 25% deposits made at six month intervals, and that deposits be posted with the TSP(s) designated to build the transmission facilities to connect the generator, with whom a posting procedure is already in place. Invenergy proposed that the deposits be returned on the date the generator signs its interconnection agreement with the applicable TSP, whereas E.ON would return half of the security deposit when the developers signs the interconnection agreement and the balance when the first phase of the project's capacity is placed in service. In reply comments, Horizon recommended that the TSP should return the collateral in phases. For example, 25% of the collateral should be returned to the developer if at least 25% of the project is interconnected within one year, 50% should be returned if more than 50% of the project is interconnected within two years and so on. All remaining collateral from all developers should be returned when the capacity of all the interconnected projects exceeds 75% of the total capacity of the CREZ.

Luminant proposed that the collateral be posted within 45 days of the first CCN filing for the relevant CREZ and that it be refunded only if the developer takes service within one year after the TSP notifies the developer that the transmission system is capable of accommodating the developer's facility.

Commission Response

The commission does not agree with Invenergy's and E.ON's proposal that the collateral should be posted in tranches. The commission determines that the full collateral should be posted no later than 30 days after the commission issues an Interim Order finding sufficient financial commitment by renewable generators for the CREZ. The commission does not agree that the collateral should be refunded to the generators in a phased manner as proposed by Horizon and E.ON, but agrees that it should be returned at the time when a generator signs the interconnection agreement for its Panhandle CREZ project as proposed by Invenergy, provided that the capacity represented by the interconnection agreement matches or exceeds the amount of MWs for which collateral was posted, and after the generator posts any security deposit required by the TSP to secure the construction of collection facilities.

Should the Collateral be Deposited with ERCOT, or with the TSP

Luminant proposed that the deposits be held by TSPs in an escrow account, similar to the accounts that retail electric providers (REPs) are required to use for holding customer deposits. In reply comments, Horizon indicated its preference for the TSPs to be holders of any collateral that may be required. Invenergy suggested that any required security deposits be posted utilizing the procedures already in place for posting deposits with TSPs.

Commission Response

The commission agrees with Luminant, Horizon and Invenergy that the deposits should be posted with and held by TSPs, because TSPs already have a process to hold similar deposits by generators, and indicates as much in the rule.

Who Should be Eligible to Post Collateral

Invenergy proposed to limit eligibility to post a collateral to all developers listed in the CREZ Order that filed financial commitment evidence in the CREZ designation proceeding, and to those that "step in the shoes" of those developers should they default.

In reply comments, NextEra suggested that if additional collateral is required, and if operational projects and other eligible renewable energy projects in the CREZ are insufficient to fill the transmission capacity, then generation outside the CREZ should be allowed to post collateral and qualify for the excess capacity mechanism, (assuming that the commission approves an excess capacity mechanism for which only projects supported by collateral are eligible). In reply comments, Horizon stated that the collateral should be posted by the renewable energy developers who participated in Docket Number 33672. If the total capacity of these projects exceeds the capacity of the CREZ as determined by the commission, the capacity for each developer should be reduced proportionally until that target is met. If the total capacity of these projects is less than the CREZ capacity, then additional collateral should be accepted for additional MWs

from CREZ developers in an attempt to reach the capacity limit approved for the CREZ.

Commission Response

The commission does not intend to link the posting of collateral to a dispatch priority mechanism and does not see any reason to limit eligibility to post collateral. Any generator that intends to build a renewable generation project in a designated CREZ is eligible to post an amount of collateral that represents the capacity of its planned project in MWs. The commission specifies as much in the rule.

Nature of the Financial Commitment Proceeding(s)

Cross Texas stated that the financial commitment proceeding should not be a contested case, and explained that the commission is seeking information that is primarily of an objective nature and the information is best collected, collated, and reviewed in a setting other than a full-blown contested case. In reply comments, Cross Texas added that the proceeding does not have to be a contested case as contemplated in PURA §39.003 and the determination for the Panhandle CREZs can be made in a rulemaking project. Cross Texas noted that the choice of proceeding via a rulemaking or a contested case is within the discretion of the commission, except as to those proceedings specifically set out in PURA.

Commission Response

The commission agrees with Cross Texas's interpretation of PURA §39.003 that the commission has the discretion to conduct a proceeding either through a rulemaking or a contested case. The commission has determined that the evaluation of financial commitments for the southern CREZs was best done through this rulemaking, whereas the more difficult evaluation of the financial commitment for the Panhandle CREZs is best handled through a contested case.

Sharyland, Cross Texas and ETT pointed out the efficiency of a single proceeding to consider levels of financial commitment for the Panhandle A and Panhandle B CREZs (rather than separate proceedings for each CREZ), as many of the transmission lines are designed to serve both CREZs.

Commission Response

The commission agrees with Sharyland, Cross Texas and ETT that it will be more efficient to conduct a single proceeding to consider the levels of financial commitment for the Panhandle A and Panhandle B CREZs because it believes that it is possible to consider the financial commitment for each CREZ separately within a single proceeding. The commission specifies in the rule that there will be a single proceeding to consider the levels of financial commitment in each of the Panhandle CREZs.

Sharyland, Cross Texas, and ETT stressed the importance of a financial commitment proceeding that is completed expeditiously. Sharyland and Higher Power proposed that a specific date or time frame be set in the rule by which the financial commitment proceeding must be concluded. Because the first CCN applications must be filed on March 1, 2010, Sharyland suggested a deadline of February 28, 2010 for the final order of the proceeding and proposed rule language to this effect.

In reply comments, E.ON supported limiting the scope of the financial commitment proceeding to applying the tiers and, if necessary, the back-up provisions suggested by E.ON. E.ON also suggested two proceedings, one each for the Panhandle region and the southern CREZs region, to save time and facilitate both applications of the back-up provisions to the tiers and the contingency that one but not another CREZ in the same region fails.

Horizon disagreed with one or more proceedings to consider levels of financial commitment for the Panhandle A and Panhandle B CREZs, contending that the issue could be addressed in each of the CCN proceedings. The scope would be limited and the TSPs would simply review the affidavits indicating that commission-approved financial commitments have not diminished over time. However, in reply comments, Horizon stated that if there were to be a proceeding, it would agree with Sharyland's suggestion to limit the scope and specify a date for the conclusion of the proceeding.

Luminant suggested that the commission initiate a proceeding shortly after this rule is adopted and require developers to file a letter of intent to post their pro rata share of the required 10% collateral, as proposed by Luminant.

Commission Response

The commission disagrees with the proposal made by Sharyland and Higher Power and supported by E.ON to set a deadline for the financial commitment proceeding and declines to make this change in the rule. The commission agrees with E.ON and other commenters that the scope of the proceeding should be limited to applying the financial commitment test and possibly other considerations as determined by the commission if one or more CREZs do not meet the test. The commission specifies as much in the rule. The commission disagrees with Horizon that the financial commitment for the Panhandle A and Panhandle B CREZs should be addressed in the CCN proceedings, because addressing the financial commitment requirement prior to the CCN proceedings will allow the commission to decide whether to proceed with the filing of the CCNs or take other action, should the financial commitment not be met. The commission also disagrees that the scope should be limited such that the TSPs would simply review the affidavits indicating that commission-approved financial commitments have not diminished over time. The commission declines to make these changes in the rule.

TIEC expressed concern that the language in subsection (d)(1) waiving the requirement that certain showings be made under PURA §37.056 for a transmission project "intended to serve a CREZ" is too broad and may provide an avenue for non-CREZ TSPs to sidestep important requirements of PURA. TIEC suggested replacing the phrase "intended to serve a CREZ" with the phrase "designated as a CREZ facility." ETT responded by arguing that TIEC's proposed change to subsection (d)(1) would unreasonably limit the commission's statutory authority.

Commission Response

The commission agrees with ETT that the language in proposed subsection (d)(1) more closely tracks the statutory language. The commission accordingly declines to change the rule as proposed by TIEC.

Commission Action in Case of Failure to Demonstrate Financial Commitment in One or More CREZs and Implication for CCNs

RES America and Horizon disagreed with the proposed language that would require the commission to order that CCNs not be filed if the financial requirement is not met, stating that this language was too prescriptive. RES America suggested that failure to satisfy the tiered-tests should result in "appropriate action by the commission." In reply comments, RES America added that this language would give the commission the flexibility to take "appropriate action" if either of the Panhandle CREZs

does not meet the financial commitment requirements specified in the rule.

Invenergy made a similar recommendation and suggested additional factors that the commission may consider to determine whether the CREZ CCNs should be approved if the financial commitment requirement is not met. In reply comments, Sharyland agreed with the need for additional flexibility and supported the language proposed by RES America. In reply comments, E.ON supported the back-up provisions recommended by RES America and Invenergy in the event a CREZ does not meet the tier standards. Horizon cautioned the commission against eliminating or delaying Panhandle CREZ facilities if they do not meet the financial commitment requirements, contending that such an action would remove the benefit of geographic diversity of supply and require ERCOT to continue to rely on a very limited source of wind generation while depriving Texas ratepayers of the economic and environmental benefits of wind resources that are the best overall in the state, and of the most beneficial and cost-effective transmission plan.

Under its proposal that wind developers be required to post a security deposit, Luminant suggested that if the developers failed to timely post the requisite collateral, the commission could take any action it deems appropriate, including, but not limited to, ordering that the relevant CCN proceedings be abated until the requisite collateral is posted, dismissing such proceedings without prejudice to re-filing upon a subsequent showing of sufficient financial commitment, or allowing a new developer to "step into the shoes" of a defaulting developer.

NextEra recommended the rule clarify that the commission will determine in the financial commitment proceeding which Panhandle CCNs will not be processed if one Panhandle CREZ fails to meet the financial commitment requirement.

E.ON commented that failure to meet the financial commitment requirement in one CREZ should not impair or delay transmission that is also needed for the other CREZ and proposed adding in the rule that CCN applications for transmission serving both CREZs should proceed if financial commitment is met for at least one of the CREZs. Cross Texas explained that there is not a one-to-one correspondence between each CREZ and each CREZ transmission facility that is related to that CREZ. In an integrated system, Cross Texas said, one cannot remove a line from the mix without impacting the integrity of the system. In reply comments, ETT shared the concerns expressed in some of the initial comments regarding the difficulty in identifying and relating transmission lines to specific CREZs. In reply comments, Sharyland agreed and said the rule should clarify that CCN applications for lines necessary to serve either Panhandle CREZ will proceed even if one Panhandle CREZ fails to meet the financial commitment criteria. In reply comments, Oncor agreed that a finding of adequate financial commitment in either Panhandle CREZ should be sufficient to support CCN applications for both CREZs.

Commission Response

The commission agrees with RES America, Horizon, Invenergy, Sharyland, and E.ON that the proposed rule language requiring the commission to order that CCNs not be filed if a CREZ fails to meet the financial requirement test is too prescriptive. While declining to adopt the specific factors proposed by Invenergy and E.ON as back-up provisions if one or more CREZs do not meet the test, the commission agrees to relax the requirement by adding language that will allow it to consider other evidence of financial commitment that it finds relevant under PURA §39.904(g)(3), delay the filing of the CREZ CCNs, find that sufficient financial commitment exists if the CREZ is closely interrelated with another CREZ that satisfies the financial commitment test, or take other appropriate action. However, the commission disagrees with the proposal made by E.ON and Sharyland and supported by Oncor to automatically approve the CCN for lines serving one Panhandle CREZ if the other Panhandle CREZ meets the financial commitment criteria and declines to make this change in the rule. Their proposal does not represent the level of financial commitment that the commission believes is commensurate to minimize the risk to customers that they may have to pay rates that would support the costs of unneeded facilities.

Requirement for Priority and Default Lines

AES was concerned that if the financial commitment requirement is not met for the Panhandle CREZs and the commission orders that the related CCNs not be filed, it raises a question regarding three transmission lines considered default lines or priority lines that are not in the Panhandle CREZs but relate to those CREZs. NextEra stated that the commission should find sufficient financial commitment for the default and priority lines. Oncor stated that the priority lines should not require additional evidence of financial commitment because the commission previously found that those lines are necessary to resolve existing congestion. NRG had similar concerns. NRG, In reply comments, AES added that the commission should find that all default and priority line CCNs, regardless of the CCN's location, have satisfied the requisite financial commitment. In reply comments, Sharyland, ETT, and Cross Texas agreed with Oncor's comments; Invenergy, Oncor, ETT, and Horizon agreed with NextEra's comments; and Oncor agreed with AES's comments. In its reply comments, E.ON supported recognition that priority lines have met the financial commitment test but did not share AES's and NextEra's view that the default projects have satisfied the financial commitment requirements and should therefore be exempted from the tier test proceedings. NRG requested that the commission clarify which lines are related to distinct zones or combination of zones so as to prevent these issues from being raised in the contested case hearings related to these lines. In its reply comments, E.ON disagreed with NRG's suggestion and opined that the difficult issue of which specific transmission facilities relate to which CREZ or CREZs can be determined if and to the extent necessary in the financial commitment proceeding in the event a CREZ fails to meet the tier test.

Commission Response

The commission agrees with AES, NextEra, Oncor, and other commenters that a CCN application for transmission facilities designated as a Default Project or a Priority Project does not require additional evidence of financial commitment. The commission disagrees with E.ON that the default lines should be subject to the financial commitment test. The commission found in Docket Number 33672 that the Priority Projects "are critical to relieve current congestion that is hampering the delivery of existing wind-powered energy to the grid." The commission reiterated this finding in Docket Number 35665. In Docket Number 36146, the commission assigned the construction responsibility for the default lines to TSPs that currently own the transmission lines that require upgrades or modifications. The commission ordered this assignment to enable those TSPs to immediately begin preparations to carry out the transmission facility upgrades

or modifications. Finally, as explained above, the commission finds that sufficient financial commitment has been shown for the McCamey, Central, and Central West CREZs. The commission, therefore, adds to the rule a finding that the financial commitment requirement for default and priority lines has been met. The commission declines to specify in the rule which lines are related to distinct zones or combination of zones as proposed by NRG, but instead agrees with E.ON that the question of which specific transmission facilities relate to which CREZ may be determined in the financial commitment proceeding in the event one of the Panhandle CREZs fails to meet the test.

Positions on Security Constrained Economic Dispatch (SCED)

TIEC, CPV, CPS, Austin Energy, and Reliant opined that SCED is the preferred methodology to dispatch resources and resolve congestion caused by excess development. TIEC contended that allowing the market to determine which resources are dispatched will help ensure that lower-cost generation is not prevented from accessing the CREZ lines. Absent this policy, TIEC continued, ratepayers would not only be saddled with increased transmission costs, they would also face increased energy costs. Higher Power agreed with the proposed amendment to first assess the effectiveness of SCED prior to assessing whether a priority dispatch mechanism is appropriate.

TIEC opposed any non-economic dispatch priority mechanisms as unlawful and stated that, if the commission decides to nonetheless consider one, it should do so only after it determines that SCED is not adequately resolving congestion issues.

AES, Eurus, Shell, Iberdrola, E.ON, and NextEra opposed reliance on SCED to dispatch wind because it does not address the excess wind development issue. NextEra pointed out that the reference to SCED establishes a prerequisite that can never be fulfilled, because SCED always resolves congestion, but does so without consideration of who is a free-rider and who is not. BNB, Invenergy, Iberdrola, Horizon, and Shell criticized the proposed amendment for allowing the commission to address excess development only after it has already occurred. NextEra was concerned that SCED only resolves congestion at a single moment in time and does not provide a long term policy to discourage excess capacity in a CREZ. These commenters favored instead a forward looking policy that prevents excess development from ever occurring. AES made similar suggestions in its reply comments. AES claimed that SCED is oblivious to generation type and thus did not fulfill the overarching policy of CREZ, which was to provide renewable generators priority access to CREZ transmission or to prevent excess capacity in a CREZ.

In reply comments, Horizon argued that the Legislature would not have established a unique process for CREZ designation if the nodal market design was seen as the panacea for the adequate development of the state's wind generation resources. Horizon commented that SCED does not take into account the physical reality of the location of best wind generation resources and therefore cannot be relied on to send the proper economic signals. Only a dispatch priority mechanism would achieve the economic and environmental benefits that the Legislature sought through the creation of the CREZ process, according to Horizon. Eurus and E.ON also disapproved of the proposed insertion of the SCED mechanism as a precedent to the establishment of dispatch priority in subsection (e). Eurus feared it would increase development risk and uncertainty. In reply comments, Austin Energy disagreed with these commenters and pointed out that SCED is the most economic dispatch solution on a system-wide basis, and any deviation from SCED would degrade market outcomes and harm consumers and the market.

Commission Response

The commission agrees with TIEC, CPV, CPS, Austin Energy, and Reliant that SCED is the preferred methodology to dispatch resources and resolve congestion caused by excess development. The commission disagrees with NextEra's contention that SCED resolves congestion only at a moment in time and believes that SCED is a competitive market solution that will send correct market signals through prices to developers considering building new capacity. In addition, the commission believes that SCED is more likely than a priority dispatch mechanism to resolve issues created by excess development in the long run as it will encourage and speed up the development of storage and possibly other technologies. The commission believes that priority dispatch interferes with market signals. The commission, therefore, disagrees with Horizon's contention that only a dispatch priority mechanism would achieve the economic and environmental benefits that the Legislature sought through the creation of the CREZ process, and believes instead that SCED will ensure that wind energy will be delivered in a manner that is most beneficial and cost-effective to the customers, as required by PURA §39.904(g).

Positions on Dispatch Priority

CPV supported the Staff's proposed modifications to subsection (e) and the deletion of the language that suggests a linkage between financial commitment and dispatch priority. CPV contended that there is no legal or equitable basis for according dispatch priority solely on evidence of financial commitment showings in Phase 1 of the Docket Number 33672 proceeding. Further, CPV contended, the commission's authority to create such a priority dispatch mechanism is limited because the commission provided no prior notice that it intended to institute dispatch priority based on financial commitment showings in the Phase 1 proceeding. Lastly, CPV noted that the showings presented in the Phase 1 proceeding are of highly variable types, amounts, and degrees of revocability and could not be readily quantified, compared, or rated against each other, and therefore could not be appropriately used to apportion limited transmission capacity.

CPS, Cielo, and Austin Energy proposed to delete subsection (e). In the alternative, Austin Energy suggested modifying subsection (e) to remove the language about limiting interconnections and establishing dispatch priority, adding that special protection schemes or other solutions should be used only to ensure reliability. Cielo reasoned that the paragraph deals with events that have not yet occurred and may never occur, which is not a proper subject for a rule. Cielo added that the parties are deeply divided on the question of the commission's statutory power to enter an order that would compromise the open access mandate in PURA, and stressed that, regardless, open access is the correct policy. In reply comments, Denton agreed that subsection (e) should be deleted or revised as suggested by Austin Energy. In reply comments, LCRA supported Austin Energy's proposal to strike subsection (e) in its entirety. In reply comments, Horizon disagreed with any proposal to eliminate subsection (e). Horizon did not object to the commission delaying a decision on the appropriate mechanism until a later date, but urged the commission to provide additional assurance of dispatch priority to wind developers in this rulemaking project by revising the rule to affirm that dispatch priority will be provided and delineating the entities that will receive the benefit of dispatch priority when it is implemented.

Luminant would eliminate the language in subsection (e) limiting physical interconnection to the CREZs as inconsistent with PURA Chapter 35, which requires the commission to ensure that an electric utility provide nondiscriminatory access to wholesale transmission service, and a similar provision in Chapter 39, which mandates access to "transmission and distribution systems for all buyers and sellers of electricity on nondiscriminatory terms." NRG questioned the commission's authority to establish a dispatch priority mechanism other than for reasons of economic efficiency and to support grid reliability. The commission does not have the authority to establish priority based on the date the unit interconnected to the grid, and in any case, "vintage priority," NRG opined, would be unsound policy.

Penn Real Estate would remove from subsection (e) any reference to limiting interconnection.

Commission Response

The commission declines to delete subsection (e) as recommended by CPS, Cielo, and Austin Energy and supported by Denton and LCRA. In response to these commenters' concerns regarding references to limiting interconnection and establishing dispatch priority, the commission notes that the proposed changes to subsection (e) do not establish that the commission intends to limit interconnections and implement dispatch priority, but instead allow these tools to be considered by the commission if it becomes necessary to resolve issues that SCED might fail to address.

In reply comments, Iberdrola recommended the commission not adopt the proposed changes to subsection (e) related to excess development. Iberdrola believed the proposed language would delay action until an excess development problem existed. In the alternative, Iberdrola urged the commission to delay consideration of the excess development issues until after the financial commitment issues are addressed in this rule. BNB, AES, RES America, Shell, Iberdrola, and Horizon favored a dispatch priority mechanism in subsection (e) as necessary to address both the excess supply of wind generation and the reliability of the ERCOT grid. AES and Shell believed that dispatch priority is needed to provide incentives for continued development of wind projects while at the same time discouraging excess development. In reply comments, CPS Energy opposed dispatch priority modifications to subsection (e) made by several wind developers and argued that the CREZ process was intended to address transmission planning and development of wind resources, not to create a means to give one developer a competitive advantage over another. In reply comments, Horizon justified a distinction between CREZ wind energy over non-CREZ wind energy by arguing that unlike the non-CREZ wind developers, those wind developers who actively participated in the CREZ process have dedicated significant resources in the implementation of the Legislative policies reflected in the CREZ amendments and therefore it is appropriate that non-CREZ developers not be allowed to enjoy the benefits of the CREZ facilities at the expense of the CREZ wind developers. Horizon also contended that the distinction between CREZ developers and non-CREZ developers is analogous to a distinction made by ERCOT Protocols which contain provisions in which different standards are placed on otherwise similarly situated generators based solely upon whether they were operational before or after a particular date and cited as an example the availability of pre-assigned congestion rights (PCRs) to only certain municipally owned utilities.

AES disagreed with Austin Energy's assertion that a dispatch priority mechanism would introduce unnecessary inefficiencies. On the contrary, AES contended that a dispatch priority mechanism would allow renewable generators access to load and send the correct market signals to investors that investment in renewable generation in ERCOT will provide their anticipated return on investment.

Shell opposed the proposed amendments to subsection (e) and proposed to work with the commission to develop instead a special protection scheme (SPS) that would prevent excess development.

BNB stated that it is unfair for the commission to change the rule after BNB and others have made significant investments in their CREZ related projects, and that the commission should amend subsection (e) to state that the commission will not allow excess development to occur in a CREZ. In its reply comments, Shell commented that the need to provide regulatory certainty and mitigate curtailment in today's constrained credit and capital environment supported a dispatch priority mechanism for those developers whose early commitments and risk-taking led to the development of the CREZ transmission system.

Commission Response

The commission declines to delete the proposed changes to subsection (e) related to excess development as recommended by Iberdrola, or to state that it will not allow excess development to occur in a CREZ as recommended by BNB. The commission does not intend to interfere with the functioning of the market in anticipation of an excess development problem that may not materialize, as suggested by these commenters. The commission determines that it is appropriate to delay consideration of excess development issues until these issues exist, and declines to include in the rule any dispatch priority mechanism as suggested by AES, Horizon, or Shell.

Commission Authority to Limit Interconnection and Implement Dispatch Priority

In reply comments, NextEra argued that if existing wind generation is replaced by newer technologies because of a lack of a dispatch priority mechanism, many existing generators will have stranded infrastructure investments, royalty owners and school districts will be deprived of revenues and customers who have signed long-term purchase power contracts with existing generators will have to shop for replacement power at higher prices. In reply comments, Shell contended that the commission has the legal authority to implement an overbuild protection mechanism in light of the non discriminatory standards in Texas law, and because PURA §39.151(i) gives the commission broad discretion to oversee the terms of generation dispatch in ERCOT.

E.ON and BNB believed that the commission has the authority to limit interconnection or adopt a dispatch priority mechanism that limits a generator's participation in the competitive market if necessary to accomplish a valid statutory purpose. BNB believed that no one disputes that a valid statutory purpose exists, and stated that the commission recognized the reasonableness of treating renewable energy developers differently based on financial commitment. E.ON added that one statutory purpose is reliability, and the other is the need to deliver renewable energy in the most beneficial and cost-effective manner. In reply comments, Oncor Cities disagreed with Shell, E.ON and Horizon on this matter, noting that the commission lacks the authority to engage in discriminatory access to transmission or dispatch based on factors other than reliability and efficiency, and stated that doing so might discourage the efficient siting of wind facilities in the future.

In reply comments, Sharyland noted that there is no consensus on the issue of whether the commission has the authority to implement a dispatch priority mechanism, and suggested that the commission defer action on the issue to avoid delays. Because applications for CCNs will start this Fall, Sharyland urged the commission to focus on resolving issues concerning the adequacy of the financial commitment, and in particular the posting of collateral. RES America urged the commission to make no changes to current subsection (e), but rather to wait until the financial commitment issues are addressed and resolved.

Commission Response

Because the amendment does not itself establish a specific dispatch priority mechanism, the commission declines to discuss the commission's authority to implement such a mechanism.

Trigger to Initiate Proceeding to Consider Dispatch Priority

E.ON proposed that the trigger to initiate a proceeding to consider dispatch priority should be when the sum of installed generation and projects with signed interconnection agreements exceed the maximum CREZ capacity. In addition, "capacity" should refer to the actual available transmission capacity for the CREZ instead of the estimated generating capacity that was included in the CREZ designation order. In reply comments, Duke urged the commission to modify subsection (e) to add a trigger that requires the start of a commission review of CREZ over-development solutions.

Commission Response

The commission declines to add to the rule a specific trigger for initiating a dispatch priority proceeding but retains the flexibility to decide at a later date whether circumstances require the consideration of such a mechanism.

Types of Dispatch Priority Mechanisms

Under Shell's SPS proposal, a wind generator that has not posted collateral or whose financial commitment was not listed in the final order in Docket Number 33672 would be allowed to interconnect to the grid and access the CREZ facilities subject to an SPS, such that in the event of congestion caused by excessive wind generation, its generating units would be the first to automatically reduce output to prevent overloading the system. Shell admitted that the proposal would be complex to implement and require substantial additional work, but reasoned that it would assist wind developers in making better economic decisions by assigning "congestion costs" due to over-development to the cost-causers, i.e., the developers that "pile on" to a transmission system design based on the project information and financial commitment of CREZ developers. Shell noted that its SPS proposal could be implemented only if and when excess development occurred, and if implemented would expire after seven years. Shell insisted that such protection from unquantifiable curtailment risk is absolutely necessary for wind generators to make prudent investment decisions and to obtain external financing. In reply comments, Austin Energy questioned this assertion, pointing out that the "second movers" will be able to procure financing for their projects without a dispatch priority. Austin Energy added that the protections Shell seeks are unavailable to any investor in the ERCOT market, CREZ or otherwise. In response to Shell's proposal to use SPSs to curtail late comers in case of congestion, ERCOT emphatically disagreed, stating that the commission should reject such an approach because it could negatively affect system reliability and will not achieve the intended purpose. Worldwide generally opposed dispatch priority proposals and specifically those of Horizon, Shell, and E.ON. Worldwide criticized those proposals for seeking "a permanently reserved portion" of the transmission capacity, attempting to discourage excess development by shutting out new competitors willing to accept lower rates of return, and seeking commission authorization to form a wind cartel with preferential transmission access. Longfellow also opposed the granting of dispatch priority to a subset of wind generators. Longfellow pointed out that PURA does not address "excess" generation of any type, so the commission should continue to let the market decide what generation and how much of it will be built to serve ERCOT. Longfellow pointed out that when the Texas electricity market was restructured, the profitability of electric generators was not guaranteed. In reply comments, TIEC argued that the dispatch priority mechanisms proposed by various wind generators are harmful to the electricity market. In reply comments, PSEG argued that Shell and BNB dispatch priority suggestions are an attack on the economic principle of Texas competitive electricity markets. PSEG argued that what Shell and BNB seek is regulatory certainty of the profitability of their investment in a competitive market.

Eurus replied to comments opposing dispatch priority generally and TIEC's arguments in particular, urging the commission to adopt a dispatch priority mechanism like the one proposed by Shell to signal to developers and financiers that orderly disposition of CREZ transmission capacity will occur. Pattern Renewables also favored the Shell proposal, however, Pattern Renewables urged the commission to defer amendments to subsection (e) until after the financial commitments proceeding(s), at which time the commission will have the ability to consider better developed options without the time pressure imposed by those proceedings.

Horizon believed that the automated or adjusted offer curve (AOC) mechanism (a proxy curve or offer floor to be used in conjunction with the SCED mechanism that would result in late arriving generators being dispatched last) would be the best approach to provide both dispatch priority and pricing ability for wind developers who have assisted the commission in the creation of the CREZ transmission plan. However, Horizon approved of Shell's SPS proposal and thought it should be further enhanced with pre-assigned congestion revenue rights (PCRRs). Those PCRRs would be assigned to wind developers whose financial commitment evidence was cited in the commission's Order in Docket Number 33672 to provide them certainty that wind energy would be delivered all the way to the load centers (so that it would not be just wind on wind priority).

In a general response to comments favoring dispatch priority methods, LCRA stated that it does not support any kind of physical rights to transmission capacity because it would be "one of the most disruptive forms of prioritization for the SCED process."

NextEra recommended deleting any reference to SPSs in the rule for several reasons. NextEra contended that SPSs are not well suited to function as a disincentive to excess wind generation due to their complicating impacts on system planning activities and on system operations. SPSs rely on hard-tripping of generation to protect transmission equipment, and ERCOT will typically operate the system to avoid tripping the SPSs. This means that the system will be re-dispatched to avoid the approaching overload on the monitored transmission element. As a result, other generators will be selected to curtail output, and the generators most likely to be selected for curtailment are the pre-CREZ generators on the antiquated 138-kV lines. In short,

SPSs would achieve the opposite of the desired goal. In reply comments, Shell disagreed with NextEra's comments, arguing that its proposal, if implemented, would be a disincentive to wind developers and prevent excess development, and that it should not be rejected just because it is complex. Invenergy supported NextEra's suggestion that the reference to SPS in subsection (e) be deleted. Instead, Invenergy suggested that the commission take the time to further evaluate the dispatch priority proposals made by commenters and add language that would provide the commission the flexibility to implement a dispatch priority mechanism at a later date. Similarly, E.ON, in reply comments, recommended that at this time, the commission only address financial commitment criteria and defer any determination regarding a dispatch priority mechanism. However, E.ON also recommended that the commission insert in subsection (e) language asserting its statutory authority to adopt a dispatch priority mechanism, resolve the issue of dispatch priority eligibility, and remove the reference to SCED.

NextEra proposed instead to include in the rule a mechanism that relies on congestion revenue rights (CRRs). Wind CRRs would function much like the current PCRRs. They would be allocated to wind generators located in a county containing the CREZ that became operational on or before the date when wind generation capacity exceeded the planned generation capacity for that CREZ. They would allow these generators to be financially hedged against losses due to congestion. The proposed CRRs would be allocated for a period of five years after the transmission lines of a particular CREZ become operational. NextEra described several advantages of using CRRs to address excess wind development, including the fact that ERCOT already has experience using this congestion management tool since the concept is already in place for non-opt-in entities (NOIEs). In addition, NextEra contended that it would provide just enough discipline to pace the interconnection of variable generation technologies and enhance ERCOT's ability to integrate wind generation additions as the transmission network is expanded and improved. NextEra believed that the commission has the authority to adopt its proposed CRR excess capacity proposal in this rulemaking. In reply comments, LCRA argued that NextEra's excess capacity proposal contradicts PURA §39.904(g)(2) and results in greater costs and loss of benefits from competition for customers. LCRA also argued that the allocation of CRRs to certain developers favors those developers against their competitors and results in a transfer of wealth from load to those favored developers. LCRA opposed NextEra's characterization of its CRR proposal as similar to the non-opt-in entities' pre-assigned CRRs for their remote generation because the pre-assignment to the non-opt-in entities protected existing resources built prior to the advent of competitive electricity markets in Texas. ERCOT responded that NextEra's proposal is feasible in ERCOT's existing CRR system. ERCOT does caution that the available transmission capacity depends on forecasts and certainty of the full rights cannot be assured.

Commission Response

Because the commission has decided not to include dispatch priority in the rule, the commission need not select among the dispatch priority mechanisms suggested by commenters.

Eligibility for Dispatch Priority

Invenergy would specify in the rule who is eligible for dispatch priority and which dispatch priority mechanism will be used. E.ON was in agreement, adding that a statement of eligibility would by itself serve as a deterrent to excess development. Invenergy and E.ON agreed that all current generation and planned projects located in a CREZ should be eligible for dispatch priority, provided such projects were proposed by a party listed in the CREZ Order and the projects satisfied one or more tiers listed in subsection (d)(2).

AES stated that it had not settled for a specific dispatch priority mechanism, but suggested that whatever mechanism is used, it should result in a dispatch hierarchy that prioritizes existing wind generators that provided testimony in Docket Number 33672 first, followed by planned wind energy projects that participated in that proceeding, followed by existing wind projects that did not participate, followed by planned projects that did not participate. Penn Real Estate also thought the rule should specify that a dispatch priority mechanism, if implemented, should benefit wind generators that provided testimony in Docket Number 33672. In reply comments, E.ON strongly disagreed with these recommendations because 1) there was no statutory basis for limiting dispatch priority to financial commitments made at the initial zone designation stage; 2) the current subsection (e) does not give exclusive priority to planned projects described in Docket Number 33672 but instead considers financial commitments at different stages as a basis for dispatch priority; 3) excluding or subjugating existing generation would be inconsistent with the Order in Docket Number 33672, which recognized the need to give the highest priority to building transmission critical to relieve current congestion that is hampering the delivery of existing wind-powered energy to the grid; and 4) failing to recognize installed generation would retroactively punish wind developers who made the full financial commitment to invest in Texas. In reply comments, Deere Wind also disagreed, arguing that if the commission adopts a dispatch priority mechanism to address any problems arising from excess wind generation development, the criterion used to assign the priority should be demonstration of financial commitment in the CCN cases, not any demonstration or participation in a previous commission proceeding. Deere Wind reasoned that granting priority on the basis of a past event denies a generator adequate notice to participate.

In its reply comments, NextEra was willing to modify the eligibility criteria for its proposed dispatch priority mechanism to include developers that were listed in the financial commitment findings in the order in Docket Number 33672 in addition to renewable generation that is operational and connected to the ERCOT grid.

Commission Response

A determination regarding eligibility for dispatch priority does not need to be made as the commission has declined to include a dispatch priority mechanism in the rule.

Evidence that a Dispatch Priority is Needed

As evidence that a priority dispatch mechanism is needed to prevent excess development, Iberdrola and Horizon argued that the total demand for transmission in the three southern CREZs already exceeds by a considerable amount the total new transmission capacity planned for those CREZs. They pointed out that the only CREZ in which development has not outpaced the planned construction of new transmission is the McCamey CREZ, in which the commission has implemented a dispatch priority mechanism similar in concept to the types of dispatch restrictions that Horizon and others have been seeking under the label "dispatch priority." Austin Energy disagreed with this conclusion, pointing out that the Tradable Generation Rights (TGRs) that were granted to wind generators in the McCamey area applied to all wind generators in a non-discriminatory

manner and no wind generator benefited from preferential treatment, and was therefore not comparable to the dispatch priority mechanism sought by these commenters.

Commission Response

The commission disagrees with Iberdrola and Horizon that there is already evidence of excess development that cannot be resolved by market mechanisms in the three southern CREZs, as the transmission lines for these CREZs have not yet been built and the SCED mechanism has not been tested. The contention by these commenters that the TGRs granted to wind generators in the McCamey area are similar in concept to the dispatch priority mechanisms they seek is not relevant to this rule as the commission has declined to include a dispatch priority mechanism in the rule.

In support of its request for protection against risks posed by late arrivers, Shell cited two cases in which the Federal Energy Regulatory Commission (FERC) approved exclusive subscriptions of transmission capacity by wind generators that made early and significant commitments to produce energy and help finance the development of the transmission line (the "anchor-tenant" concept). Whereas subsequent non-anchor generators were not prevented from physical interconnection to the transmission, according to Shell, they did so at terms that were less advantageous. Austin Energy disagreed that these cases could be used as precedents to justify priority access or priority dispatch for wind developers in ERCOT because, in the two referenced cases, the wind developers contributed half the capital toward the project in return for the right to purchase half the line's capacity, whereas in ERCOT, transmission is paid for by load. In reply comments, PSEG said that the "anchor-tenant" model to allocate transmission rights would violate Texas law because Texas law prohibits physical transmission rights.

Commission Response

The commission determines that Shell's suggestion that the "anchor-tenant" concept constitutes a precedent for the use of dispatch priority to protect early developers from risks posed by late arrivers is not relevant to this rule as the commission has declined to include a dispatch priority mechanism in the rule.

Iberdrola further argued that a dispatch priority mechanism that favors early movers was needed on fairness ground, because late-arriving generators could purposely locate further out on the system so that they would have lower shift factors on the transmission limiting element, which would cause SCED to unfairly dispatch the free-riders while curtailing the early movers. NextEra made similar comments. Horizon made similar comments in its reply comments.

Commission Response

The commission recognizes the difficulty faced by early arrivers because any new generation project that sites in the same vicinity at a later date will have an impact on dispatch that could not be anticipated by the earlier generators. However, the commission determines that it is preferable to allow the competitive market to determine winners and losers initially. The commission should only intervene when there is evidence that the competitive market fails to resolve issues regarding excess development. The commission believes that the proposed language in subsection (e) allows for such intervention if it becomes necessary to resolve issues of excess development.

Miscellaneous

Cielo suggested that the commission provide in the rule a numerical value for the transmission capacity it has ordered for the Panhandle A and B CREZs, to simplify the evidentiary standard for each CREZ and eliminate any possible confusion. In reply comments, Sharyland agreed and suggested that the numerical values be 3,191 MW for Panhandle A, and 2,393 MW for Panhandle B (as determined in Docket Number 33672.) In its reply comments, E.ON agreed with Cielo's recommendation that the rule should specify numerical megawatt capacities for each of the CREZs to remove any ambiguity about the 50%, 75%, and 100% tier standards that must be met.

Commission Response

The commission agrees with Cielo, Sharyland, and E.ON and adds the megawatt capacity of each Panhandle CREZ in the rule to remove any ambiguity about the 50% target sought by the financial commitment standards.

ETT asked the commission to provide assurance that the lines serving the Panhandle CREZs will qualify for rate recovery under PURA §36.053(d). In reply comments, Cross Texas agreed and asked that the commission confirm that this provision will apply to the work currently done by selected TSPs towards the filing of their respective CCNs according to the schedule set by the commission in Projects Number 36801 and 36802.

Commission Response

The commission determines that the assurance sought by ETT and Cross Texas regarding rate recovery is outside the scope of this rule and declines to modify the rule to include such language.

All comments, including any not specifically referred to herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §§14.001, 14.002, 39.101(b)(3), 39.151, and 39.904 (Vernon 2007 and Supplement 2009) (PURA). Section 14.001 provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002 provides the commission with the authority to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; §39.101(b)(3) provides that a customer is entitled to have access to providers of energy generated by renewable energy resources; §39.151 provides the commission with authority over electricity dispatch and grid reliability in ERCOT and over the accounting for the production and delivery of electricity among generators and all other market participants in ERCOT; and §39.904 provides the commission with the authority to adopt rules necessary to administer and enforce the programs to promote the development of renewable energy technologies and requires the commission to designate competitive renewable energy zones and develop a plan to construct transmission capacity necessary to deliver electric output from renewable energy technologies to electricity customers in a manner that is most beneficial and cost-effective to the customers.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 39.101, 39.151, and 39.904.

§25.174. Competitive Renewable Energy Zones.

(a) Designation of competitive renewable energy zones. The designation of Competitive Renewable Energy Zones (CREZs) pursuant to Public Utility Regulatory Act (PURA) §39.904(g) shall be made through one or more contested-case proceedings initiated by commission staff, for which the commission shall establish a procedural schedule. The commission shall consider the need for proceedings to determine CREZs in 2007 and in subsequent years as deemed necessary by the commission.

(1) Commission staff shall initiate a contested case proceeding upon receiving the information required by paragraph (2) of this subsection. Any interested entity that participates in the contested case may nominate a region for CREZ designation. An entity may submit any evidence it deems appropriate in support of its nomination, but it shall include information prescribed in paragraph (2)(A) - (C) of this subsection.

(2) By December 1, 2006, the Electric Reliability Council of Texas (ERCOT) shall provide to the commission a study of the wind energy production potential statewide, and of the transmission constraints that are most likely to limit the deliverability of electricity from wind energy resources. ERCOT shall consult with other regional transmission organizations, independent organizations, independent system operators, or utilities in its analysis of regions of Texas outside the ERCOT power region. At a minimum, the study submitted by ERCOT shall include:

(A) a map and geographic descriptions of regions that can reasonably accommodate at least 1,000 megawatts (MW) of new wind-powered generation resources;

(B) an estimate of the maximum generating capacity in MW that each zone can reasonably accommodate and an estimate of the zone's annual production potential;

(C) a description of the improvements necessary to provide transmission service to the region, a preliminary estimate of the cost, and identification of the transmission service provider (TSP) or TSPs whose existing transmission facilities would be directly affected;

(D) an analysis of any potential combinations of zones that, in ERCOT's estimation, would result in significantly greater efficiency if developed together; and

(E) the amount of generating capacity already in service in the zone, the amount not in service but for which interconnection agreements (IAs) have been executed, and the amount under study for.

(3) The Texas Department of Parks and Wildlife may provide an analysis of wildlife habitat that may be affected by renewable energy development in any candidate zone, and may submit recommendations for mitigating harmful impacts on wildlife and habitat.

(4) In determining whether to designate an area as a CREZ and the number of CREZs to designate, the commission shall consider:

(A) whether renewable energy resources and suitable land areas are sufficient to develop generating capacity from renewable energy technologies;

(B) the level of financial commitment by generators; and

(C) any other factors considered appropriate by the commission as provided by PURA, including, but not limited to, the estimated cost of constructing transmission capacity necessary to deliver to electric customers the electric output from renewable energy resources in the candidate zone, and the estimated benefits of renewable energy produced in the candidate zone.

(5) The commission shall issue a final order within six months of the initiation by commission staff of a CREZ proceeding, unless it finds good cause to extend the deadline. For each new CREZ it orders, the commission shall specify:

(A) the geographic extent of the CREZ;

(B) major transmission improvements necessary to deliver to customers the energy generated by renewable resources in the CREZ, in a manner that is most beneficial and cost-effective to the customers, including new and upgraded lines identified by voltage level and a general description of where any new lines will interconnect to the existing grid;

(C) an estimate of the maximum generating capacity that the commission expects the transmission ordered for the CREZ to accommodate; and

(D) any other requirement considered appropriate by the commission as provided by PURA.

(6) The commission may direct a utility outside of ERCOT to file a plan for the development of a CREZ in or adjacent to its service area. The plan shall include the maximum generating capacity that each potential CREZ can reasonably accommodate; identify the transmission improvements needed to provide service to each CREZ; and include the cost of the improvements and a timetable for complying with all applicable federal transmission tariff requirements.

(b) Level of financial commitment by generators for designating a CREZ.

(1) A renewable energy developer's existing renewable energy resources, and pending or signed IAs for planned renewable energy resources, leasing agreements with landowners in a proposed CREZ, and letters of credit representing dollars per MW of proposed renewable generation resources, posted with ERCOT, that the developer intends to install and the area of interest are examples of financial commitment by developers to a CREZ. The commission may also consider projects for which a TSP, ERCOT, or another independent system operator is conducting an interconnection study; and any other factors for which parties have provided evidence as indications of financial commitment.

(2) A non-utility entity's commitment to build and own transmission facilities dedicated to delivering the output of renewable energy resources in a proposed CREZ to the transmission system of a TSP in Texas or a deposit or payment to secure or fund the construction of such transmission facilities by an electric utility or a transmission utility to deliver the output of a renewable generation project in Texas is an indication of the entity's financial commitment to a CREZ.

(c) Plan to develop transmission capacity.

(1) After the issuance of a final order in accordance with subsection (a)(5) of this section, entities interested in constructing the transmission improvements shall submit expressions of interest to the commission. The commission shall select the entity or entities responsible for constructing the transmission improvements, establish a schedule by which the improvements shall be completed, and specify any additional reporting requirements or other measures deemed appropriate by the commission to ensure that entities complete the ordered improvements in a timely manner.

(2) The commission shall develop a plan to construct transmission capacity necessary to deliver to electric customers, in a manner that is most beneficial and cost-effective to the customers, the electric output from renewable energy technologies in the CREZ.

(3) In developing the transmission capacity plan, the commission may consider:

(A) the estimated cost of constructing transmission capacity necessary to deliver to electric customers the electric output from renewable energy resources in the candidate zone;

(B) the estimated cost of additional ancillary services; and

(C) any other factors considered appropriate by the commission as provided by PURA.

(d) Certificates of convenience and necessity.

(1) Not later than one year after a commission final order designating a CREZ, each TSP selected to build and own transmission facilities for that CREZ shall file all required CREZ Certificate of Convenience and Necessity (CCN) applications. The commission may grant an extension to this deadline for good cause. The commission may establish a filing schedule for the CCN applications.

(2) A CCN application for a transmission project intended to serve a CREZ need not address the criteria in PURA §37.056(c)(1) and (2).

(3) In determining whether financial commitment for a CREZ is sufficient under PURA §39.904(g)(3) to grant CCNs for transmission facilities for the CREZ, the commission shall consider the following evidence of financial commitment by renewable generators:

(A) capacity represented by installed generation located in one or more of the counties that lie in whole or in part within the CREZ;

(B) capacity represented by generation projects under construction that are located in one or more of the counties that lie in whole or in part within the CREZ and that will be operational within six months of the final order in a financial commitment proceeding initiated pursuant to paragraph (6) of this subsection. Evidence that the project will be operational within six months may include documentation showing that a construction contractor has been hired, that preliminary site work has begun, that the project financing has closed, or similar indicators of the status of the project.

(C) capacity represented by planned generation projects that are located in one or more of the counties that lie in whole or in part within the CREZ and that have a signed IA with a TSP that has been defined in subsection (a)(2)(E) of this section designated to build and own transmission facilities for that CREZ; and

(D) capacity represented by collateral posted by generators for the CREZ that complies with paragraph (7) of this subsection.

(4) Financial commitment for a CREZ is sufficient under PURA §39.904(g)(3) to grant CCNs for transmission facilities for the CREZ if the sum of the renewable generating capacity under any combination of paragraph (3)(A), (B), (C), and (D) of this subsection is at least 50% of the designated generating capacity for the CREZ. Fifty percent of the designated generating capacity for the Panhandle A CREZ approved by the commission in Docket Number 33672 shall be considered to be 1,595.5 MW. Fifty percent of the designated generating capacity for the Panhandle B CREZ approved by the commission in Docket Number 33672 shall be considered to be 1,196.5 MW.

(5) Installed renewable generation, renewable generation projects under construction, and planned renewable generation projects with signed IAs in the McCamey, Central, and Central West CREZs approved by the commission in Docket Number 33672 satisfy the financial commitment test set forth in paragraph (4) of this subsection for those CREZs and therefore financial commitment by renewable generators for those CREZs is sufficient under PURA §39.904(g)(3) to grant CCNs for transmission facilities for those CREZs. This finding of sufficient financial commitment shall be recognized in the CCN proceedings for transmission facilities for those CREZs and shall not be addressed further in those proceedings.

(6) Commission staff shall initiate a single proceeding for the commission to determine whether there is sufficient financial commitment under PURA §39.904(g)(3) by renewable generators for the Panhandle A and Panhandle B CREZs approved by the commission in Docket Number 33672 to grant CCNs for transmission facilities for those CREZs. If the commission determines that there is sufficient financial commitment for one of those CREZs, that finding shall be recognized in the CCN proceedings for transmission facilities for that CREZ, as identified in the commission's order in the proceeding initiated pursuant to this paragraph, and shall not be addressed further in the CCN proceedings. If the commission determines that the Panhandle A or Panhandle B CREZ does not satisfy the financial commitment test in paragraph (4) of this subsection, the commission may:

(A) consider other evidence of financial commitment that the commission finds relevant under PURA §39.904(g)(3);

(B) find that the financial commitment requirement for that CREZ has been met if the commission determines that significant financial commitment exists in that CREZ and that the CREZ is sufficiently interrelated with a CREZ that has satisfied the financial commitment test;

(C) delay the filing of CREZ CCN applications for that CREZ until the commission conducts a subsequent proceeding in which it finds sufficient financial commitment for that CREZ in accordance with the financial commitment provisions of this subsection; or

(D) take other appropriate action.

(7) A renewable generator that elects to post collateral pursuant to paragraph (3)(D) of this subsection shall comply with the following requirements:

(A) The renewable generator shall provide a letter of intent to post collateral in a proceeding conducted pursuant to paragraph (6) of this subsection. The renewable generator shall then post the collateral no later than 30 days after the commission issues an interim order finding sufficient financial commitment by renewable generators for the CREZ. If the renewable generators post sufficient collateral, the commission may enter a final order with findings that reflect the adequacy of the financial commitment for the CREZ. If the renewable generators do not post sufficient collateral, the commission may enter a final order with findings that reflect the inadequacy of the financial commitments for the CREZ.

(B) A renewable generator shall post collateral equal to $15,350 per MW of its planned project capacity, or $10,000 per MW if the capacity is supported by leasing agreements with landowners that convey a right or option for a period of at least 20 years to develop and operate a renewable energy project based on a conversion factor of 60 acres per MW for a wind energy project.

(C) A renewable generator planning to build a project in a CREZ shall post collateral with the TSP with which it will interconnect in the CREZ or, if the TSP with which it will interconnect has not been determined, with any TSP that has been designated to build and own transmission facilities for that CREZ.

(D) A renewable generator may post collateral by providing a cash deposit, letter of credit, or guaranty agreement from an entity with an investment-grade credit rating. A TSP shall require a renewable generator that posts a guaranty agreement to provide another

form of collateral if the guarantor loses its investment-grade credit rating or declares bankruptcy. If the renewable generator does not provide another form of collateral, the commission may take appropriate action including seeking administrative penalties.

(8) A TSP that receives collateral from a renewable generator pursuant to paragraph (7) of this subsection shall handle that collateral in accordance with the following provisions.

(A) If a renewable generator signs an IA with the TSP and posts any collateral required by the TSP to secure the construction of collection facilities, the TSP shall return to the generator all collateral received from that generator.

(B) If a renewable generator does not sign an IA with the TSP and post any collateral required by the TSP to secure the construction of collection facilities within 90 days after the TSP notifies it that the transmission system is capable of accommodating the renewable generator's renewable energy facility, the TSP shall retain the collateral received from the generator as an offset to the cost of the transmission facilities the TSP constructs for the CREZ and shall take all reasonable measures to execute any non-cash collateral.

(9) In a CREZ CCN application, a TSP may propose modifications to the transmission facilities described in a CREZ order if such improvements would reduce the cost of transmission or increase the amount of generating capacity that transmission improvements for the CREZ can accommodate. The commission may direct ERCOT to review modifications proposed by the TSP.

(10) Findings in Docket Numbers 33672, 35665, and 36146 and the commission's finding in paragraph (5) of this subsection establish that the level of financial commitment is sufficient under PURA §39.904(g)(3) to grant CCNs for transmission facilities designated as a Default Project in ordering paragraph 1 of the Order in Docket Number 36146 and for transmission facilities designated as a Priority Project in finding of fact 136 in the Order on Rehearing in Docket Number 33672. This finding of sufficient financial commitment shall be recognized in all pending and future CCN proceedings for Default and Priority Projects and shall not be addressed further in those proceedings.

(e) Excess development in a CREZ. If the aggregate level of renewable energy capacity for which transmission service is requested for a CREZ exceeds the maximum level of renewable capacity specified in the CREZ order, and if the commission determines that the security constrained economic dispatch mechanism used in the power region to establish a priority in the dispatch of CREZ resources is insufficient to resolve the congestion caused by excess development, the commission may initiate a proceeding and may consider limiting interconnection to and/or establishing dispatch priorities regarding the transmission system in the CREZ, and identifying the developers whose projects may interconnect to the transmission system in the CREZ under special protection schemes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2009.

TRD-200904645

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: November 4, 2009
Proposal publication date: July 17, 2009
For further information, please call: (512) 936-7223

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SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

16 TAC §25.491

The Public Utility Commission of Texas (commission) adopts an amendment to §25.491, relating to Record Retention and Reporting Requirements, with changes to the proposed text as published in the July 17, 2009, issue of the *Texas Register* (34 TexReg 4716). The amendment removes the June 1st reporting deadline and instead requires a retail electric provider to provide the report when it files its annual report pursuant to §25.107, relating to Certification of Retail Electric Providers (REPs). The amendment also conforms the titles of §25.475 and §25.476 to the titles adopted in amendments to those rules. The amendment is a competition rule subject to judicial review as specified in Public Utility Regulatory Act §39.001(e). The amendment is adopted under Project Number 37007.

The commission received comments on the proposed amendment from Reliant Energy Retail Services, LLC (Reliant) and jointly filed comments from the Alliance for Retail Markets (ARM) and the Texas Energy Association of Marketers (TEAM).

Summary of Comments

ARM and TEAM supported the final adoption of the proposed amendments to §25.491.

Reliant recommended that the commission clarify in the rule its expectation that the information required by §25.491 will be submitted with a retail electric provider's annual report pursuant to §25.107. Reliant stated that this clarification will avoid confusion regarding whether the information is required in the semiannual report pursuant to §25.107.

Reliant further noted that a reference to the June 1 reporting date also exists in §25.480, relating to Bill Payment and Adjustments, and recommends the commission make a similar amendment to that rule in another rulemaking.

Commission Response

The commission agrees that the language recommended by Reliant provides additional clarification and modifies the rule accordingly.

The commission declines to adopt an amendment to §25.480 because that rule is outside the scope of this rulemaking. The commission will, however, consider initiating a rulemaking to amend §25.480.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2009) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and in particular, §17.004 and §39.101, which direct the commission to implement customer protections for electric customers.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.004, and 39.101.

§25.491. Record Retention and Reporting Requirements.

(a) Application. This section does not apply to a municipally owned utility where it offers retail electric power or energy outside its certificated service territory or to a retail electric provider (REP) that is an electric cooperative.

(b) Record retention.

(1) Each REP and aggregator shall establish and maintain records and data that are sufficient to:

(A) Verify its compliance with the requirements of any applicable commission rules; and

(B) Support any investigation of customer complaints.

(2) All records required by this subchapter shall be retained for no less than two years, unless otherwise specified.

(3) Unless otherwise prescribed by the commission or its authorized representative, all records required by this subchapter shall be provided to the commission within 15 calendar days of its request.

(c) Annual reports. In its annual report, a REP shall report the information required by §25.107 of this title (relating to Certification of Retail Electric Providers (REPs)) to the commission and the Office of Public Utility Counsel (OPUC) and the following additional information on a form approved by the commission for the 12-month period ending December 31 of the prior year:

(1) The number of residential customers served, by nine-digit zip code and census tract, by month;

(2) The number of written denial of service notices issued by the REP, by month, by customer class, by nine-digit zip code and census tract;

(3) The number and total aggregated dollar amount of deposits held by the REP, by month, by customer class, by nine-digit zip code and census tract;

(4) Information relating to the REP's bill payment assistance program for residential electric customers required by §25.480(g)(2)(B) of this title (relating to Bill Payment and Adjustments);

(5) The number of complaints received by the REP from residential customers for the following categories by month, by nine-digit zip code and census tract:

(A) Refusal of electric service, which shall include all complaints pertaining to the implementation of §25.477 of this title (relating to Refusal of Electric Service);

(B) Marketing and quality of customer service, which shall include complaints relating to the interfaces between the customer and the REP, such as, but not limited to, call center hold time, responsiveness of customer service representatives, and implementation of §25.472 of this title (relating to Privacy of Customer Information), §25.475 of this title (relating to General REP Requirements and Information Disclosures to Residential and Small Commercial Customers), §25.473 of this title (relating to Non-English Language Requirements), §25.476 of this title (relating to Renewable and Green Energy Verification), and §25.484 of this title (relating to Texas Electric No-Call List), and which shall not include issues for which the REP is not responsible, such as, but not limited to, power quality, outages, or technical failures of the registration agent;

(C) Unauthorized charges, which shall encompass all complaints pertaining to §25.481 of this title (relating to Unauthorized Charges);

(D) Enrollment, which shall encompass all complaints pertaining to the implementation of §25.474 of this title (relating to the Selection of Retail Electric Provider), §25.478 of this title (relating to Credit Requirements and Deposits), and §25.495 of this title (relating to Unauthorized Change of Retail Electric Provider);

(E) Accuracy of billing services, which shall encompass all complaints pertaining to the implementation of §25.479 of this title (relating to Issuance and Format of Bills); and

(F) Collection and service termination, and disconnection, which shall encompass all complaints pertaining to the implementation of §25.480 of this title, and §25.483 of this title (relating to Disconnection of Service).

(6) In reporting the number of informal complaints received pursuant to paragraph (4) of this subsection, a REP may identify the number of complaints in which it has disputed categorization or assignment pursuant to the provisions set forth in §25.485 of this title (relating to Customer Access and Complaint Handling).

(d) Additional information. Upon written request by the commission, a REP or aggregator shall provide within 15 days any information, including but not limited to marketing information, necessary for the commission to investigate an alleged discriminatory practice prohibited by §25.471(c) of this title (relating to General Provisions of the Customer Protection Rules).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 14, 2009.

TRD-200904641
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: November 3, 2009
Proposal publication date: July 17, 2009
For further information, please call: (512) 936-7223

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TITLE 22. EXAMINING BOARDS

PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

CHAPTER 361. ADMINISTRATION

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §361.6

The Texas State Board of Plumbing Examiners (Board) adopts amendments to §361.6, concerning fees, without changes to the proposed text as published in the July 31, 2009, issue of the *Texas Register* (34 TexReg 4999).

The amendments to §361.6 are necessary in order for the Board to utilize revenue, as provided in Article VIII and Article IX of the General Appropriations Act (Senate Bill 1, 81st Legislature, Regular Session), which is contingent upon the Board assess-

ing fees sufficient to generate $1,085,520.00 in additional revenue during the 2010-2011 biennium. Under the current fee structure, the Board will not generate enough revenue during the 2010-2011 biennium to meet the amount necessary for the Board to access the contingent revenue. The Board considered several scenarios for amending this rule. The Board determined the proposed scenario to be the most reasonable and fair since each licensee and registrant affected would benefit from the Board's ability to better protect the heath, safety, and welfare of the citizens by utilizing additional funding for administration and enforcement of the statutes set forth in Chapter 1301 of the Texas Occupations Code ("Plumbing License Law"), and Board Rules. Administration and enforcement of the Plumbing License Law includes registration, examination and licensing of the plumbing industry. Additional benefits include the investigation of consumer complaints, job-site compliance checks, and enforcement action against persons who endanger the health, safety and welfare of the citizens by violating the Plumbing License Law and Board Rules.

No comments were received regarding the proposed amendments after publication in the *Texas Register.*

The amendments are adopted under and affect Plumbing License Law §§1301.251, 1301.253, and 1301.403, the rule it amends, and the General Appropriation Acts, Article VIII, Board of Plumbing Examiners (Senate Bill 1, 81st Legislature, Regular Session). Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. Section 1301.253 of the Plumbing License Law requires the Board to set fee amounts that are reasonable and necessary to cover the costs of administering the statutes regulating the plumbing profession. Plumbing License Law §1301.403 sets forth the requirements for renewal of a license. The General Appropriations Act, Article VIII and Article IX (Senate Bill 1, 81st Legislature, Regular Session) provides additional funding to the Board contingent upon the Board assessing fees sufficient to generate $1,085,520.00 in additional revenue, during the 2010-2011 biennium. The amendments are also adopted under Texas Government Code §2006.002, as amended by the 80th Legislature, HB 3430, which requires an agency to perform an Economic Impact Statement and Regulatory Flexibility Analysis if a proposed rule could have an adverse economic impact on small businesses.

No other statute, article, or code is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2009.

TRD-200904603
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Effective date: November 1, 2009
Proposal publication date: July 31, 2009
For further information, please call: (512) 936-5224

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER P. SURVEILLANCE AND CONTROL OF BIRTH DEFECTS

25 TAC §§37.301 - 37.306

The Executive Commissioner of the Health and Human Services Commission (commission) on behalf of the Department of State Health Services (department) adopts amendments to §§37.301 - 37.306, concerning the surveillance and control of birth defects, without changes to the proposed text as published in the August 14, 2009, issue of the *Texas Register* (34 TexReg 5466) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The birth defects program was established by Health and Safety Code, Chapter 87, to monitor birth defects; to collect reports of and maintain a registry of birth defects; and to conduct "investigations to determine the nature and extent of the disease, or the known or suspected cause of the birth defect and to formulate and evaluate control measures to protect the public health."

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 37.301 - 37.306 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Amendments to §§37.301, 37.302, 37.304, and 37.306 clarify and improve the rule language in order to strengthen the requirements of the program. The amendment to §37.303(10)(I) adds "a clinical or medical laboratory" to the types of health facility definitions. Amendments to §37.303(14) and §37.305(d) add new language to provide guidance for remote electronic access active data collection.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §87.001, which allows the department to specify which health facilities are required to report information on birth defects; §87.021(d), which requires the department to adopt rules to govern the operation of the program and carry out the intent of the statute; §87.022(b) and (c), which requires the department to adopt rules on how information is made available to the department; §87.063(a), which requires the department to adopt rules to establish criteria to be used in deciding if research which

proposes to use birth defect data should be approved; and the Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2009.

TRD-200904646
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: November 4, 2009
Proposal publication date: August 14, 2009
For further information, please call: (512) 458-7111

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CHAPTER 97. COMMUNICABLE DISEASES
SUBCHAPTER A. CONTROL OF COMMUNICABLE DISEASES

25 TAC §97.7

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts an amendment to §97.7, concerning the control of communicable diseases requiring exclusion from schools without changes to the proposed text as published in the May 29, 2009, issue of the *Texas Register* (34 TexReg 3343) and, therefore, the section will not be republished.

BACKGROUND AND PURPOSE

The Communicable Disease Act requires the department to designate communicable diseases that require exclusion from schools, but not child-care facilities (Health and Safety Code, §81.042). Child-care facilities are governed by minimum standards, designed to promote the health and safety of children attending licensed facilities, promulgated by the Department of Family and Protective Services (Human Resources Code, §42.042(e)). The Department of Family and Protective Services rule (40 TAC, §746.3603) has adopted by reference the department's current rule, §97.7 on school exclusion. The references to child-care facilities in §97.7 have been deleted because the department has no authority to exclude children from child-care facilities.

The overall purpose of the rule is to provide school personnel as well as parents with guidance regarding appropriate control measures for the prevention and containment of wound, skin, and soft tissue infections. The amendments are necessary to provide a more comprehensive rule related to the prevention of transmission of skin and soft tissue infections in school settings.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 97.7 has been reviewed and the department has determined that reasons for adopting the section continue to exist because a rule on this subject is needed.

SECTION-BY-SECTION SUMMARY

The amendments to §97.7 create an additional condition for which children may be excluded from schools to prevent the transmission of bacterial infections, especially antibiotic resistant staphylococcal infections. The amendment addresses all wound and skin and soft tissue infections instead of only one specific skin and soft tissue infection concerning impetigo. The caption and text of the rule has also been amended to delete references to exclusion from child-care facilities because the department has no authority to exclude children from child-care facilities. Exclusion from these facilities is addressed in 40 TAC, §746.3603, of the Department of Family and Protective Services, which has adopted by reference the exclusion list in the department's current rule, §97.7.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rule during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §81.004, which gives the commissioner of the department (commissioner) general statewide responsibility for the administration of the Communicable Disease Act and authorizes the adoption of rules necessary for its effective administration and implementation; §81.042(c), which requires rules to establish procedures to determine if a child should be reported and excluded from school; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of the Health and Safety Code, Chapter 1001. The review of the rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 14, 2009.

TRD-200904639
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: November 3, 2009
Proposal publication date: May 29, 2009
For further information, please call: (512) 458-7111

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 19. AGENTS' LICENSING
SUBCHAPTER R. UTILIZATION REVIEW AGENTS

28 TAC §19.1722

The Commissioner of Insurance adopts amendments to §19.1722, relating to the Utilization Review Advisory Committee. The amendments are adopted without changes to the proposed text published in the August 14, 2009, issue of the *Texas Register* (34 TexReg 5485).

The amendments are necessary to re-establish a Utilization Review Advisory Committee pursuant to the Insurance Code §4201.003. Section 4201.003 requires the Commissioner to appoint an advisory committee to advise the Commissioner on development of rules regarding the administration of Chapter 4201, as authorized by Government Code §2001.031. The Utilization Review Advisory Committee previously established and operated pursuant to the prior §19.1722 automatically terminated on December 31, 1998, pursuant to prior §19.1722(e). It is necessary to establish a new committee because of the enactment of House Bill (HB) 4290, 81st Legislature, Regular Session, effective September 1, 2009. HB 4290 enacts changes to the Insurance Code Chapter 4201 that result in the need to substantively revise 28 TAC Chapter 19, Subchapter R, relating to the regulation of utilization review agents. HB 4290 expands the definition of "utilization review" in the Insurance Code Chapter 4201 to include retrospective reviews for medical necessity and to include reviews to determine the experimental or investigational nature of health care services. Rules are necessary to implement HB 4290, and the Utilization Review Advisory Committee that is established by this adoption order will advise the Commissioner on development of the rules necessary to Implement HB 4290.

Government Code, Chapter 2110 specifies the requirements and procedures for state agency advisory committees. Government Code §2110.0012 provides that a state agency has established an advisory committee if state or federal law has specifically created the committee to advise the agency or the agency has, under state or federal law, created the committee to advise the agency. Government Code §2110.005 requires a state agency that establishes an advisory committee to, by rule, state the purpose and tasks of the committee and describe the manner in which the committee will report to the agency. Government Code §2110.008 authorizes a state agency that has established an advisory committee to designate the date on which the committee will automatically be abolished and requires that the designation be by rule. Additionally, Government Code §2110.008 provides for automatic abolishment of an advisory committee on the fourth anniversary of the creation of the advisory committee if no abolishment date by rule is provided.

The amendment to §19.1722(a) clarifies that the use of the term "advisory committee" throughout the section is a reference to the Utilization Review Advisory Committee.

The Amendments are adopted to update obsolete statutory references in §19.1722(a) and (d) as a result of the adoption of the non-substantive Insurance Code revision. These amendments are necessary for ease of use and readability of the rules. The Insurance Code Article 21.58A, which was referenced in §19.1722(a), was repealed in the non-substantive Insurance Code revision, Acts 2005, 79th Legislature, Chapter 727, §4, effective April 1, 2007. The Insurance Code Article 21.58A was readopted without substantive change as the Insurance Code Chapter 4201 in the same non-substantive Insurance Code revision. The Insurance Code Article 21.58A, §13, which was cited in §19.1722(d), was readopted as the Insurance Code §4201.003 as part of the non-substantive Insurance Code revision. Additionally, amendments are adopted to change references to "Insurance Code" to "the Insurance Code" throughout the section to reflect current agency style.

An amendment to §19.1722(b) establishes that the purpose of the advisory committee is to: (i) advise the Commissioner on the development of rules determined by the Department as necessary to implement HB 4290, 81st Legislature, Regular Session, effective September 1, 2009, that amends the Insurance Code Chapter 4201; and (ii) to advise the Commissioner on other changes and additions to the existing rules regulating utilization review that the Department determines are needed to administer the Insurance Code Chapter 4201.

The amendment to §19.1722(c)(1) provides that the advisory committee shall review and evaluate proposed changes and additions to the current utilization review rules. The amendment to §19.1722(c)(2) provides that the advisory committee shall advise and consult with the Commissioner or the Commissioner's representative during its review and evaluation made pursuant to §19.1722(c)(1). The amendments also delete §19.1722(c)(3), which is no longer needed, and redesignate existing §19.1722(c)(4) as (c)(3). The amendment to newly designated §19.1722(c)(3) provides that the advisory committee shall perform other tasks related to the development of rules as provided by §19.1722(c)(1) and as requested by the Commissioner pursuant to the Insurance Code Chapter 4201.

The Amendments to §19.1722(d) and (d)(1) add two additional representatives to the utilization review advisory committee. The additional representatives are: (i) a representative for a workers' compensation carrier and (ii) a representative for injured employees. These two representatives are added for the following reason: When the Insurance Code chapter 4201 was first enacted as Article 21.58A in 1991, the utilization review provisions in it were not made applicable to health care services provided as part of workers' compensation coverage. Instead, it only applied to the utilization review of health care services provided under health coverage. However, in 1997 the Legislature required workers' compensation coverage to be made subject to the utilization review requirements in the Insurance Code. Government Code §2001.002(b) provides that the composition of an advisory committee that advises a state agency regarding an industry or occupation regulated or directly affected by the agency must provide a balanced representation between the industry or occupation and consumers of services provided by the agency, industry, or occupation. Therefore, with the applicability of the Insurance Code chapter 4201 utilization review provisions to workers' compensation it is necessary that the Utilization Review Advisory Committee include a balanced representation of the workers' compensation industry and consumers. Additionally, it is necessary to amend §19.1722(d)(1) to clarify that the reference in existing §19.1722(d)(1) to one representative for a "consumer group" is actually referring to one representative for a "health coverage consumer group." This reference in existing §19.1722(d)(1) could result in confusion because it does not specify the type of consumer group. When the Insurance Code chapter 4201 was first enacted as Article 21.58A, it re-

quired "one representative for. . . a consumer group." The original statute did not specify what type of consumer group was to have a representative on the Utilization Review Advisory Committee; however, since the original statute only applied to health coverage, the most effective type of consumer group to be represented on the committee would be a *health coverage* consumer group. As noted above, the expansion of applicability of the Insurance Code utilization review provisions to apply to workers' compensation coverage necessitates the addition of two new representatives to the advisory committee to ensure a balanced representation: a representative for a workers' compensation insurance carrier, and a representative for injured employees. Injured employees could be considered a type of consumer, therefore to avoid confusion between the original reference to "a consumer group" and the new group that must be represented for balanced representation, injured employees, §19.1722(d)(1) has been clarified to mean a *"health coverage* consumer group."

New §19.1722(e) is necessary to address reporting requirements of the committee. The subsection provides that after completion of review and evaluation of proposed changes and additions to the current utilization review rules in 28 TAC Chapter 19, Subchapter R, or completion of any other tasks in accordance with §19.1722(c)(3), the advisory committee shall submit a report of its recommendations to the Commissioner. Existing §19.1722(e) is redesignated as §19.1722(f).

Under the amendment to newly designated §19.1722(f), the advisory committee shall automatically terminate on December 31, 2010, unless, before its termination, the Commissioner extends its duration by rule.

The amendment to §19.1722(a) clarifies that the use of the term "advisory committee" throughout the section is a reference to the Utilization Review Advisory Committee.

As a result of the amendments to update obsolete statutory references in §19.1722(a) and (d), the rules will be easier to use and to understand.

Under the amendment to §19.1722(b)(1) and in accordance with the stated purpose, the advisory committee will: (i) advise the Commissioner on the development of rules determined by the Department as necessary to implement HB 4290 enacted by the 81st Legislature to amend the Insurance Code Chapter 4201, relating to Utilization Review and Independent Review; and (ii) advise the Commissioner on other changes and additions to the existing rules regulating utilization review that the Department determines are needed to administer the Insurance Code Chapter 4201.

The advisory committee, pursuant to the amendment to §19.1722(c)(1), will review and evaluate proposed changes and additions to the existing utilization review rules. Pursuant to the amendment to §19.1722(c)(2), the advisory committee will advise and consult with the Commissioner or the Commissioner's representative during the review and evaluation of any proposed changes and additions to the existing utilization review rules. Under the amendment to newly designated §19.1722(c)(3), the advisory committee will perform other tasks related to the development of rules as provided by §19.1722(c)(1) and as requested by the Commissioner pursuant to the Insurance Code Chapter 4201.

Two additional representatives are added to the advisory committee by the amendments to §19.1722(d) and (d)(1). The additional representatives are: (i) a representative for a workers' compensation carrier and (ii) a representative for injured employees. The reference to "one representative for . . . a consumer group" in §19.1722(d)(1) is amended to clarify that the paragraph refers to "one representative for . . . a *health coverage* consumer group."

Committee requirements are addressed by new §19.1722(e). The advisory committee will, pursuant to the subsection, submit a report of its recommendations to the Commissioner after completion of review and evaluation of proposed changes and additions to the current utilization review rules in 28 TAC Chapter 19, Subchapter R, or completion of any other tasks in accordance with §19.1722(c)(3).

The advisory committee will, pursuant to the amendment to newly designated §19.1722(f), automatically terminate on December 31, 2010 unless, before its termination, the Commissioner extends its duration by rule.

§19.1722(d)(1). Committee Membership.

Comment: A commenter suggests that proposed §19.1722(d)(1) be changed to provide that the Utilization Review Advisory Committee include an Office of Injured Employee Counsel (OIEC) representative in its membership. The commenter states that OIEC is the Texas agency statutorily charged with representing the interests of injured employees as a class, and that as such it should have input in the process of developing the utilization review rules, particularly because the utilization review process has become increasingly important in the workers' compensation system. The commenter also states that OIEC's experience and expertise in assisting injured employees in the Texas workers' compensation system would allow it to provide useful insights to the process of utilization review rule development.

Agency Response: The Department agrees with the commenter that OIEC should be represented on the Utilization Review Advisory Committee; however, it is not necessary to change the proposed text to provide for such representation. The proposed rule, which is adopted without change, specifies that the advisory committee shall be comprised of representatives of various interested parties, including "[o]ne representative for. . . injured employees." Because the OIEC is charged with representing the interests of injured employees in Texas, the appointment of an OIEC representative to the Utilization Review Advisory Committee would be appropriate.

For with changes: The Office of Injured Employee Counsel. Against: None.

The amendments are adopted pursuant to Government Code §§2110.002, 2110.005, 2110.008, and 2110.0012, and the Insurance Code §4201.003 and §36.001. Government Code §2110.002(b) provides that the composition of an advisory committee that advises a state agency regarding an industry or occupation regulated or directly affected by the agency must provide a balanced representation between the industry or occupation and consumers of services provided by the agency, industry, or occupation. Government Code §2110.005 requires a state agency, when it establishes an advisory committee, to adopt rules that state the purpose and tasks of the advisory committee and that describe the manner in which the advisory committee will report to the agency. Section 2110.008(a) provides that a state agency that has established an advisory committee may designate the date on which the committee will automatically be abolished, that the designation must be by rule, and that the committee may continue in existence after that date only if the agency amends the rule to provide for a different abolishment date. Government Code §2110.0012 provides that

a state agency has established an advisory committee if state or federal law has specifically created the committee to advise the agency or if the agency has, under state or federal law, created the committee to advise the agency. The Insurance Code §4201.003(a) authorizes the Commissioner to adopt rules to implement Insurance Code Chapter 4201. The Insurance Code §4201.003(c) requires the Commissioner to appoint an advisory committee to advise the Commissioner on development of rules regarding the administration of Chapter 4201 and specifies the duties and composition of the advisory committee. The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904727
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: November 8, 2009
Proposal publication date: August 14, 2009
For further information, please call: (512) 463-6327

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER A. GENERAL RULES

34 TAC §3.9

The Comptroller of Public Accounts adopts an amendment to §3.9, concerning electronic filing of returns and reports; electronic transfer of certain payments by certain taxpayers, without changes to the proposed text as published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6094). This section is being amended to implement House Bill 2154, 81st Legislature, 2009. Effective September 1, 2009, Tax Code, §155.105, is amended to require wholesalers and distributors of tobacco products to include in the report they must file electronically with the comptroller the net weight as listed by the manufacturer for each unit of tobacco products other than cigars that is sold to retailers in this state. This requirement will apply to sales occurring on or after September 1, 2009. Subsection (c) is being amended to identify the new information that must be reflected in the reports and to clarify that the new information that must be included applies only to tobacco products other than cigars that are sold to retailers on or after September 1, 2009.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §155.105.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2009.

TRD-200904684
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: November 8, 2009
Proposal publication date: September 4, 2009
For further information, please call: (512) 475-0387

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SUBCHAPTER B. NATURAL GAS

34 TAC §3.21

The Comptroller of Public Accounts adopts an amendment to §3.21, concerning exemption or tax reduction for high-cost natural gas, without changes to the proposed text as published in the August 28, 2009, issue of the *Texas Register* (34 TexReg 5890). Subsections (i), (j) and (l) are being amended to clarify the method for requesting credits or refunds.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements Tax Code, §201.057.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 13, 2009.

TRD-200904605
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: November 2, 2009
Proposal publication date: August 28, 2009
For further information, please call: (512) 936-6472

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 1. STATE MENTAL RETARDATION AUTHORITY RESPONSIBILITIES

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts the repeal of existing Subchapter I, consisting of §§1.401 - 1.414, concerning the Texas Department of Mental Health and Mental Retardation (TDMHMR) In-Home and Family Support Program, in Chapter 1, State Mental Retardation Authority Responsibilities; and new Subchapter I, consisting of §§1.401 - 1.405, 1.407, 1.409, and 1.411, concerning the In-Home and Family Support Mental Retardation Program in Chapter 1, State Mental Retardation Authority Responsibilities without changes to the proposal as published in the July 31, 2009, issue of the *Texas Register* (34 TexReg 5049).

The repeal and new subchapter are adopted to delete mental health references, add a one-time (lifetime) grant of up to $3600 for architectural modifications or special equipment, and eliminate detailed procedural provisions, which will be included in the program handbook.

DADS received no comments regarding adoption of the repeal and new sections.

SUBCHAPTER I. TDMHMR IN-HOME AND FAMILY SUPPORT PROGRAM

40 TAC §§1.401 - 1.414

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §535.002(a).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2009.

TRD-200904600
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: November 1, 2009
Proposal publication date: July 31, 2009
For further information, please call: (512) 438-3734

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SUBCHAPTER I. IN-HOME AND FAMILY SUPPORT MENTAL RETARDATION PROGRAM

40 TAC §§1.401 - 1.405, 1.407, 1.409, 1.411

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §535.002(a), which provides DADS with the authority to implement and administer the In-Home and Family Support-Mental Retardation Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2009.

TRD-200904601
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: November 1, 2009
Proposal publication date: July 31, 2009
For further information, please call: (512) 438-3734

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CHAPTER 90. INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION OR RELATED CONDITIONS SUBCHAPTER C. STANDARDS FOR LICENSURE

40 TAC §90.42

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts an amendment to §90.42, in Chapter 90, Intermediate Care Facilities for Persons with Mental Retardation or Related Conditions, without changes to the proposed text published in the July 31, 2009, issue of the *Texas Register* (34 TexReg 5054).

The amendment is adopted to add an advance practice nurse and a physician assistant as persons authorized to perform the annual physical exam of a resident of an intermediate care facility for persons with mental retardation or related conditions. Previously, only a medical doctor was authorized to perform such an exam.

DADS received no comments regarding adoption of the amendment.

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2009.

TRD-200904602
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: November 1, 2009
Proposal publication date: July 31, 2009
For further information, please call: (512) 438-3734

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PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 815. UNEMPLOYMENT INSURANCE

SUBCHAPTER F. EXTENDED BENEFITS

40 TAC §§815.170 - 815.174

The Texas Workforce Commission (Commission) adopts the following sections to new Subchapter F, *without* changes, to Chapter 815 related to Unemployment Insurance, as published in the August 14, 2009, issue of the *Texas Register* (34 TexReg 5489):

Subchapter F, Extended Benefits, §§815.170, 815.171, 815.173, and 815.174

The Commission adopts the following section to new Subchapter F, *with* changes, to Chapter 815 related to Unemployment Insurance, as published in the August 14, 2009, issue of the *Texas Register* (34 TexReg 5489):

Subchapter F, Extended Benefits, §815.172

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted Chapter 815 rule changes is to adjust unemployment eligibility periods, as necessary, to maximize receipt of 100 percent federally shared extended unemployment benefits in accordance with the American Recovery and Reinvestment Act of 2009, enacted February 17, 2009 (P.L. 111-5), Division B, Title II, relating to Assistance for Unemployed Workers and Struggling Families, §2005. This authority was granted to the Commission under House Bill (HB) 4586, 81st Texas Legislature, Regular Session (2009).

The Commission must take this action in order to pay unemployed individuals who are exhausting their regular and emergency unemployment benefits. During this period of high, sustained unemployment, these 100 percent federally shared extended benefits are vital to out-of-work Texans who are struggling to pay their bills while seeking work. These benefits also serve as a much-needed stabilizing factor in local economies.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

SUBCHAPTER F. EXTENDED BENEFITS

The Commission adopts new Subchapter F, as follows:

§815.170. State "On" and "Off" Indicator Weeks: Conditional Trigger

New §815.170 adds a new, conditional trigger under which Texas could enter into an extended benefit eligibility period, allowing the state to receive 100 percent federally shared extended benefits as authorized under P.L. 111-5.

There are two methods under which a state may trigger on to an extended benefit period:

--(1) a specified threshold under the Insured Unemployment Rate (IUR) methodology; and

--(2) a specified threshold under the Total Unemployment Rate (TUR) methodology.

Texas Labor Code, Chapter 209, provides for the use of the IUR methodology. However, its threshold is so high that Texas would have to have substantial levels of chronic unemployment before triggering on to an extended benefit period. The U.S. Department of Labor (DOL) has advised states that they may enact a temporary, conditional TUR trigger in order to take advantage of 100 percent federally shared extended benefits. The TUR trigger described in this section is conditional upon 100 percent federal sharing of extended benefits as recommended and approved by DOL.

§815.171. High Unemployment Period: Maximum Total Extended Benefit Amount

New §815.171 adds a definition of "high unemployment period" and provides a different methodology for calculating an individual's maximum total extended benefit amount if the state has triggered on to a "high unemployment period."

The Federal-State Extended Unemployment Compensation Act of 1970 (Federal EB Law), et seq., requires that if a state has opted to enact the optional TUR trigger, it must also provide for increased benefits under a "high unemployment period."

§815.172. Concurrent Emergency Unemployment Compensation Programs

New §815.172 stipulates that Texas may pay extended unemployment benefits after all regular and emergency unemployment compensation has been exhausted. There are additional administrative requirements associated with implementing extended benefits that are not applicable to other 100 percent federally funded emergency unemployment compensation programs. Ordering payment of extended benefits after all other types of unemployment benefits have been exhausted helps the Agency make better use of the resources available to serve claimants. This ordering of benefits is allowable under Public Law 110-252.

Comment: One commenter requested clarification on why the word "shall" is used instead of "may" in §815.172.

Response: The Commission appreciates the comment and notes that when originally proposed, this section stipulated that the state *shall* pay extended benefits after all regular and emergency unemployment compensation has been exhausted. Since then, Congress has proposed an additional round of emergency unemployment compensation benefits, but has authorized states that so choose to continue paying extended benefits rather than switch claimants already receiving extended

benefits to this additional emergency compensation. The Commission believes that revising the language to the permissive "may" allows Texas to take advantage of the exception that Congress has created, alleviates an administrative burden for the state, and ensures continuity for claimants.

§815.173. Eligibility Requirements during a Period of 100 Percent Federally Shared Benefits

New §815.173 provides that individuals who exhaust emergency unemployment compensation are otherwise eligible for extended unemployment benefits even if their benefit year for regular benefits has exhausted. This provision is intended to consider individuals eligible for extended benefits if they exhaust emergency unemployment compensation after their benefit year ends.

§815.174. Financing of Extended Benefits

New §815.174 clarifies that the benefit charging provisions of Texas Labor Code, Chapter 209, Subchapter E relating to taxed employers, do not apply to circumstances in which 100 percent of extended benefits are shared by the federal government. The charging provisions are intended to account for the 50 percent of benefits that would be funded from the state's share under the standard provisions of the Federal EB Law. Because there is no state sharing under this subchapter, the taxed employer charging provisions are not necessary.

This section further clarifies that charges to governmental employers (§209.084 of the Act) and Indian tribes (§209.0845 of the Act) shall apply.

COMMENTS WERE RECEIVED FROM:

Rachel Stroud, Stroud & Welch, PLLC, Austin, Texas

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted rules affect Texas Labor Code, Title 4.

§815.172. Concurrent Emergency Unemployment Compensation Programs.

The Agency may pay unemployment compensation benefits under other emergency unemployment compensation programs that may be in effect prior to paying extended benefits under this subchapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 13, 2009.

TRD-200904609
Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery Branch
Texas Workforce Commission
Effective date: November 2, 2009
Proposal publication date: August 14, 2009
For further information, please call: (512) 475-0829

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Adopted Rule Review

Credit Union Department

Title 7, Part 6

The Credit Union Commission (Commission) has completed the review of Texas Administrative Code, Title 7, §§91.405, Records Retention and Preservation, 91.406, Credit Union Service Contracts, 91.407, Electronic Notification, 91.408, User Fee for Shared Electronic Terminal, 91.4001, Authority to Conduct Electronic Operations, 91.4002, Transactional Web Site Notice Requirement; and Security Review, 91.5001, Emergency Closing, 91.5002, Effect of Closing, and 91.5005, Permanent Closing of an Office, as published in the July 17, 2009, issue of the *Texas Register* (34 TexReg 4743).

The rules were reviewed as a result of the Credit Union Department's (Department) general rule review.

The Commission received no comments with respect to these rules. The Department believes that the reasons for initially adopting these rules continue to exist. The Commission finds that the reasons for initially adopting §§91.405, 91.406, 91.407, 91.408, 91.4001, 91.4002, 91.5001, 91.5002, 91.5005 continue to exist and readopts these rules without changes pursuant to the requirements of Government Code, §2001.039.

TRD-200904732
Harold E. Feeney
Commissioner
Credit Union Department
Filed: October 19, 2009

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 7 TAC §25.2(c)

Model Waiver of Right to Cancel in English.

To use this form: You must reproduce this form on ONE PAGE. The caption in this form is in Arial 14pt, the narrative paragraphs are in Times 12pt, and the consumer inquires and complaints disclosure is in Arial 9pt fonts.

Waiver of Right to Cancel
(For Prepaid Funeral Benefit Contracts)

Name of Purchaser: _____

Contract Number: _____

Seller: _____

1. I am the purchaser of the Contract listed above. By signing my name below, I am waiving my right to cancel the Contract, as permitted by the Texas Finance Code, Section 154.155.

2. I understand that I will **NOT** be able to cancel the Contract and receive any refund from the Seller in the future **even if I move out of the community in which I currently live or change my mind.**

_____ _____

Signature of Purchaser

Acknowledgement of Seller
(Or Seller's Agent)

Date Signed: _____

Date Signed: _____

The Seller is required to deliver a copy of this signed Waiver to the Purchaser.

The Texas Department of Banking regulates the sale of prearranged funeral contracts and has approved the form of this Waiver. You can file a consumer complaint with the Department by calling (877) 276-5554 (a toll free call). The Department's website address is http:\\www.banking.state.tx.us. If you have questions or would like additional information on prepaid funeral contracts, visit www.prepaidfunerals.state.tx.us.

[Form # 10/09 Waiver]

Figure: 7 TAC §25.3(b)

Guaranteed Services & Merchandise.

To use this form: You must reproduce this form on PAGE ONE of the contract. The Caption in this form is in Arial 12pt, the narrative paragraphs and the section detailing the guaranteed services and merchandise are in Arial 9pt fonts.

Statement of Funeral Goods and Services Selected

(A) GUARANTEED SERVICES & MERCHANDISE:

The Total Contract Price below includes the goods and services to be delivered at the time of the Contract Beneficiary's death. You are not purchasing goods and services where price is left blank. You can purchase the goods and services left blank at the time of the funeral service. Certain purchases can be required by law or by a cemetery or crematory. This contract allows You to pay in advance and **freeze the costs of the Guaranteed Services and Merchandise selected below.**

BASIC SERVICES OF FUNERAL DIRECTOR AND STAFF, AND OVERHEAD $_____

EMBALMING: (explanation below)

Embalming services ..... $_____

If You selected a funeral that may require embalming, such as a funeral with viewing, You may have to pay for embalming. You do not have to pay for embalming You did not approve if You selected arrangements such as a direct cremation or immediate burial. If we charged for embalming, we will explain why below.

(describe):_____

OTHER PREPARATION OF THE BODY:

Bathing body..... $_____
Cosmetic/Beautician..... $_____
Dressing/Casketing ..... $_____
Refrigeration fee (# days_____) ..... $_____
Other _____ $_____

USE OF FACILITIES AND STAFF:

Rosary or prayer service ..... $_____
Viewing/Visitation (# days_____)..... $_____
Funeral ceremony at funeral home..... $_____
Funeral ceremony at other facility..... $_____
Memorial service at funeral home..... $_____
Memorial service at other facility ..... $_____
Use of equipment and staff for graveside service..... $_____
Other ..... $_____

TRANSPORTATION SERVICES:

Transfer of remains to funeral home (_____ mile radius)..... $_____
Hearse (funeral coach)..... $_____
Funeral Sedan..... $_____
Limousine (#_____)..... $_____
Pallbearer car..... $_____
Clergy car..... $_____
Flower car..... $_____
Other ..... $_____

OTHER SERVICES:

Forwarding of remains to another funeral home (describe) _____ $_____
Receiving remains from another funeral home (describe)_____ $_____
Other _____ $_____
Immediate Burial (Basic Charge)..... $_____
Direct Cremation (Basic Charge)..... $_____

Disposition: □ Burial □ Cremation □ Other

GOODS:

Casket.....$_____
□ Wood Type: _____
□ Steel: □ 16 ga □ 18 ga □ 20 ga □ ___ ga □ Stainless
□ Bronze: □ 32 oz □ 48 oz. □ Copper: □ 32 oz □ 48 oz.
□ Other: _____
□ Seal □ Nonseal □ Gasketed □ Nongasketed □ N/A
Interior Lining: □ Crepe □ Velvet □ Satin □ Other_____
Shell: □ Square □ Round Exterior color: (opt)_____

Outer burial container (see explanation on page 2) $_____
□ Liner □ Vault □ Box □ Other (*describe*):
_____
□ Concrete □Wood Type: _____
□ Steel: □ 7 ga □ 10 ga □ 12 ga □ 14 ga □ Stainless
□ Bronze _____ oz. □ Copper _____ oz.
□ Other:_____
□ Seal □ Nonseal □ N/A

Alternative Container: (describe) _____$_____

Urn: (Name and Primary Construction)
_____ $_____

Shipping Container: (describe)_____$_____

Clothing: (describe) _____ $_____

Stationery/Cards: (describe)
_____ (#_____) $_____

Memorial Book:_____(#_____) $_____

Acknowledgement cards: (describe)
_____ (#_____) $_____

Other _____ $_____
Other _____ $_____

(A) TOTAL COST OF GUARANTEED ITEMS:	$

Figure: 7 TAC §25.3(c)(1)

Non-Guaranteed Services & Merchandise.

To use this form: You must reproduce this form on either PAGE ONE or PAGE TWO of the contract. The Caption in this form is in Arial 10pt, the narrative paragraphs and the section detailing the non-guaranteed services and merchandise are in Arial 9pt fonts.

(B) NON-GUARANTEED CASH ADVANCE ITEMS:

The items and amounts listed below are specified as *Non-Guaranteed*. You understand that these amounts are ***ESTIMATES*** only and are not frozen in cost. This section allows You to set aside funds for non-guaranteed items. At the time of death, these funds may be used for any cash advance items. **You are not prefunding any items below where price is left blank.**

Initial here to confirm You have read this: ____

We charge You for our services in obtaining the items with the boxes marked:

- □ Cemetery Opening & Closing Fee ..... $_____
- □ Cemetery Set-Up *(tent-chairs-carpet)* ..... $_____
- □ Crematory Fees ..... $_____
- □ Clergy Honorarium ..... $_____
- □ Death Certificates ..... $_____
- □ Flowers ..... $_____
- □ Obituary Notices ..... $_____
- □ Organist/Pianist ..... $_____
- □ Outside Facility Rental ..... $_____
- □ Police Escort ..... $_____
- □ Transportation ..... $_____
- □ Vocalist ..... $_____
- □ Other ..... $_____
- □ Other ..... $_____
- □ Other ..... $_____
- □ Other ..... $_____

(B) TOTAL CASH ADVANCE ITEMS:	**$**

Subtotal (**A from page 1 + B**): ..... $_____

(Less): Discounts/Adjustments: _____ $_____

TOTAL CONTRACT PRICE:	$

Explanation of Certain Charges

Charges are only for those items that You selected or that are required. If we are required by law or by a cemetery or crematory to use any items, we will explain the reasons in writing below.

Reason for Outer Burial Container or Other: (describe): _____

Figure: 7 TAC §25.3(c)(2)

Cash Advance Items not included in Guaranteed Services & Merchandise.

To use this form: You must reproduce the narrative of this form exactly as written and place it on the bottom of PAGE ONE of the contract. The form is in Arial 9pt fonts.

Unless specified in the Guaranteed Services and Merchandise itemized ABOVE, the Provider will charge and require payment for any of these items shown below, which may be selected at the time of the funeral.

Initial here to confirm You have read this: ☐

Embalming Due to Autopsy
Embalming Due to Organ/Tissue Donor
Funeral Home Overtime Fees (e.g. holiday service)
Donation of Body to Hospital/Medical School
Special-need Cosmetic Procedures
Unforeseen Expenses

Cemetery Set-up (tent-chairs-carpet)
Cemetery Opening/Closing Fee
Cemetery Property
Cemetery Overtime Fees
Crematory Fees
Outside Facility Rental

Clergy Honorarium
Death Certificates
Flowers
Newspaper Notices
Musicians and Singers
Police Escorts
Public Transportation

Figure: 7 TAC §25.3(f)(2)(E)

Insurance funded cancellation benefit.

To use this form: You must reproduce the narrative of this form exactly as written and place it in the Contract / Policy Cancellation or Assignment Section on the contract. The form is in Times 10pt fonts.

If you cancel the Insurance Policy after the "free look" period has expired, the surrender value will be paid in accordance with the Insurance Policy's provisions and may be significantly less than the Premiums that You have paid.

Initial here to confirm You have read this: ☐

Figure: 7 TAC §25.3(h)

Changes to a Contract at the Death of the Contract Beneficiary.

To use this form: You must reproduce the narrative of this form exactly as written. The captions in this form are in Times 12pt and the narrative paragraphs are in Times 10pt fonts.

Changes to Disposition at the Time of Death

If You are the Purchaser and the Contract Beneficiary, You are the only person who can change the method of Your disposition selected in this contract. A disposition change can only be made by You signing a written document with new instructions **AFTER** the date of this contract.

If You are the Purchaser but NOT the Contract Beneficiary, You can change the method of disposition unless the Contract Beneficiary has signed written instructions regarding his/her disposition.

Changes to the Guaranteed Services and Merchandise at the Time of Death

Related to contracts not fully funded: If payments are due at the time of death, this contract **is not** fully funded and the final funeral service could be different from the funeral You planned.

Related to fully funded contracts: If no further payments are due at the time of death on the Guaranteed Services and Merchandise, this contract is fully funded. However, the Responsible Person may decide to change Your selections up to 10% of the Guaranteed Services and Merchandise. The Provider must give a credit if the changes result in decreased costs, but is not required to refund any money.

In addition, the Responsible Person and the Provider can agree to changes in excess of 10% of the Guaranteed Services and Merchandise selected. If the Responsible Person and the Provider agree to make changes in excess of 10%, the Provider must give credit for any changes that decrease costs and if applicable, issue a refund to Your estate. The Responsible Person must pay the Provider for any changes that result in increased costs.

You can prevent all changes to the Guaranteed Services and Merchandise that You have selected under a fully funded contract by signing the box below.

I am the Purchaser and the Contract Beneficiary. I **do not** want the Responsible Person to make any changes to the ***Guaranteed Services and Merchandise*** selected on page 1 of my fully funded contract.

Sign here to confirm this is your choice. _____

Figure: 7 TAC §25.3(i)(4)(D)

Insurance Policy Premiums.

To use this form: You must reproduce the narrative of this form exactly as written and place it in the Payment Terms Section on the contract. The form is in Times 10pt fonts.

The Premiums You pay on the Insurance Policy(s) may not equal the Total Contract Price. You could pay more or less, depending on several factors (for example: your age, health and type of Insurance Policy purchased). The maximum amount of Premiums You could pay over the term of the Insurance Policy(s) for this contract is $ _____.

Initial here to confirm You have read this: _____

Figure: 7 TAC §25.3(i)(4)(E)

Insurance Policy(s) in excess of 5% of the Total Contract Price.

To use this form: You must reproduce the narrative of this form exactly as written and place it in the Payment Terms Section on the contract. The form is in Times 10pt fonts.

IF APPLICABLE: The initial face amount of the Insurance Policy(s) issued to fund this contract exceeds the total contract price by more than 5%. The excess amount is $_____ and is included in the policy face amount. The Provider will receive this excess face amount at the time of the funeral to cover its costs. If You do not want the excess coverage, You may ask if the Seller offers other Insurance Policy(s) to fund this contract.

Initial here to confirm You have read this and agree to the excess coverage: ☐

Figure: 7 TAC §25.3(k)(1)

Complaint Disclosure.

To use this form: You must reproduce the narrative of this form exactly as written and place it on the bottom of the Required Signatures and Notices Section on the contract. The form is in Times 9pt fonts.

For Insurance-Funded Contracts:

Inquiries should be directed as below. All complaints must be in writing.

Concerning the Prepaid Contract:	**Concerning the funeral service or funeral director:**	**Concerning the Insurance Policy:**
Texas Department of Banking 2601 N. Lamar, Austin, Texas 78711 1-877-276-5554 (toll free) www.banking.state.tx.us	Texas Funeral Service Commission P. O. Box 12217, Austin, Texas 78711 1-888-667-4881 (toll free) www.tfsc.state.tx.us	Texas Department of Insurance P. O. Box 149194, Austin, Texas 78714 1-800-252-3439 (toll free) www.tdi.state.tx.us

For Trust-Funded Contracts:

Inquiries should be directed as below. All complaints must be in writing.

Concerning the Prepaid Contract:	**Concerning the funeral service or funeral director:**
Texas Department of Banking 2601 N. Lamar, Austin, Texas 78711 1-877-276-5554 (toll free) www.banking.state.tx.us	Texas Funeral Service Commission P. O. Box 12217, Austin, Texas 78711 1-888-667-4881 (toll free) www.tfsc.state.tx.us

Figure: 7 TAC §84.808(7)

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate.	**FINANCE CHARGE** The dollar amount the credit will cost me.	**Amount Financed** The amount of credit provided to me or on my behalf.	**Total of Payments** The amount I will have paid after I have made all payments as scheduled.	**Total Sale Price** The total cost of my purchase on credit, including down payment of $_____
%	$	$	$	$

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Security: You will have a security interest in the motor vehicle being purchased.
Late Charge: [**True daily earnings:**] (Option A:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge at the rate of _____% per year on the past due amount. The late charge on the past due amount will be earned from the due date to the date that it is paid. (Option B:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge of _____% of the scheduled payment. [**Scheduled installment earnings method or sum of the periodic balances:**] (Option A:) If I do not pay my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge on the past due amount at the contract rate. (Option B:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge at the rate of _____% per year on the late amount. The late charge on the past due amount will be earned from the due date to the date that it is paid. (Option C:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge of _____% of the scheduled payment.
Prepayment: [**True daily earnings method:**] If I pay all that I owe early, I will not have to pay a penalty. [**Sum of the periodic balances method:**] I can pay all that I owe early. If I do so, I can get a refund of part of the Finance Charge.
Additional information: I will refer to this document for information about nonpayment, default, security interests, any required repayment in full before the scheduled date, and prepayment refunds.

Figure: 7 TAC §84.808(8)(A)

ITEMIZATION OF AMOUNT FINANCED

1. Cash price [Optional additional description: "(including any accessories, services, and taxes)"] $_____(1)

2. Downpayment =
[*If netting add*: (if negative, enter "0" and see Line 4.A. below)]
Gross trade-in $_____
- payoff by Seller $_____
= net trade-in $_____
[*If not netting add*: (if negative enter "0" and see Line 4.A. below)]
+ cash $_____
+ Mfrs. Rebate $_____
+ other (describe) _____ $_____
Total downpayment $_____(2)

3. Unpaid balance of cash price (1 minus 2) $_____(3)

4. Other charges including amounts paid to others on my behalf (Seller may keep part of these amounts.):
   A. Net trade-in payoff [*Alternative caption*: "prior credit or lease balance"] to _____ $_____
   B. Cost of physical damage insurance paid to insurance company $_____
   C. Cost of optional coverages with physical damage insurance paid to insurance company $_____
   D. Cost of optional credit insurance paid to insurance company or companies $_____
      Life
      Disability
   E. Debt cancellation agreement fee paid to the Seller $_____
   F. Official fees paid to government agencies $_____
   G. Dealer's inventory tax [*Optional addition*: (if not included in cash price)] $_____
   H. Sales tax [*Optional addition*: (if not included in cash price)] $_____
   I. Other taxes [*Optional addition*: (if not included in cash price)] $_____
   J. Government license and/or registration fees $_____
   K. Government certificate of title fee $_____
   L. Government vehicle inspection fees $_____
   M. Deputy service fee paid to dealer $_____
   N. **Documentary fee. A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents relating to the sale. A documentary fee may not exceed a reasonable amount agreed to by the parties. This notice is required by law. [*Option to insert Spanish translation of disclosure here.*]** $_____
   O. Other charges (Seller must identify who is paid and describe purpose)
      to_____for_____ $_____
      to_____for_____ $_____
      to_____for_____ $_____
      Total other charges and amounts paid to others on my behalf $_____(4)

5. **Amount Financed** (3 + 4) $_____(5)

[*Optional caption*: Taxes, title fee, license fee, and any state inspection fee (*except for $7.00 of each such inspection fee that will be retained by Seller*) will be paid by Seller to government agencies. Documentary fee and deputy service fee will be retained by Seller and the Seller may also retain part or all of the insurance, service contracts, and other charges.]

[Note: A creditor may delete portions of the figure applicable to any insurance premiums or debt cancellation fees that are not financed in the contract and may also delete other inapplicable portions. Under item 4, a creditor may add a line for "other insurance paid to insurance company."]

Figure: 7 TAC §84.808(8)(B)

ITEMIZATION OF AMOUNT FINANCED

1. Cash price [Optional additional description: "(including any accessories, services, and taxes)"] $_____(1)

2. Downpayment (A + B) =
   A. [*If netting add*: (if negative, enter "0" and see Line 4.A. below)]
   Gross trade-in $_____
   - payoff by Seller $_____
   = net trade-in $_____
   B. [*If not netting add*: (if negative enter "0" and see Line 4.A. below)]
   + cash $_____
   + Mfrs. Rebate $_____
   + other (describe) _____ $_____
   Total downpayment $_____(2)

3. Unpaid balance of cash price (1 minus 2) $_____(3)

4. Other charges including amounts paid to others on my behalf (Seller may keep part of these amounts.):
   A. Net trade-in payoff [*Alternative caption*: "prior credit or lease balance"] to _____ $_____
   B. Cost of physical damage insurance paid to insurance company $_____
   C. Cost of optional coverages with physical damage insurance paid to insurance company $_____
   D. Cost of optional credit insurance paid to insurance company or companies $_____
      Life
      Disability
   E. Debt cancellation agreement fee paid to the Seller $_____
   F. Official fees paid to government agencies $_____
   G. Dealer's inventory tax [*Optional addition*: (if not included in cash price)] $_____
   H. Other taxes [*Optional addition*: (if not included in cash price)] $_____
   I. Government license and/or registration fees $_____
   J. Government certificate of title fee $_____
   K. Government vehicle inspection fees $_____
   L. Deputy service fee paid to dealer $_____
   M. **Documentary fee. A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents relating to the sale. A documentary fee may not exceed a reasonable amount agreed to by the parties. This notice is required by law.** ***[Option to insert Spanish translation of disclosure here.]*** $_____
   N. Other charges (Seller must identify who is paid and describe purpose)
      to_____for_____ $_____
      to_____for_____ $_____
      to_____for_____ $_____
   Total Itemized Charges upon which the Finance Charge is assessed $_____(4)

5. Total Unpaid Balance Plus Itemized Charges Upon which the Finance Charge is assessed. (3+4) $_____(5)
6. Total Sales Tax (Upon Which No Finance Charge is Assessed) $_____(6)
7. **Amount Financed** (5+6) $_____(7)
   Finance Charge (Not Assessed Upon Sales Tax) $_____

[*Optional caption*: Taxes, title fee, license fee, and any state inspection fee (*except for $7.00 of each such inspection fee that will be retained by Seller*) will be paid by Seller to government agencies. Documentary fee and deputy service fee will be retained by Seller and the Seller may also retain part or all of the insurance, service contracts, and other charges.]

[Note: A creditor may delete portions of the figure applicable to any insurance premiums or debt cancellation fees that are not financed in the contract and may also delete other inapplicable portions. Under item 4, a creditor may add a line for "other insurance paid to insurance company."]

Figure: 7 TAC §84.808(11)

MODEL CLAUSE FOR PHYSICAL DAMAGE INSURANCE

PROPERTY INSURANCE: I must keep the collateral insured against damage or loss in the amount I owe. I must keep this insurance until I have paid all that I owe under this contract. I may obtain property insurance from anyone I want or provide proof of insurance I already have, The insurer must be authorized to do business in Texas. I agree to give you proof of property insurance. I must name you as the person to be paid under the policy in the event of damage or loss.

[Note: The following optional provisions are included for creditors who finance physical damage insurance. Creditors who do not routinely finance physical damage coverage, or who are not financing it in a particular transaction, may delete the remaining disclosures in this figure. A creditor may also delete those portions below that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.]

If any insurance is included below, policies or certificates from the insurance company will describe the terms, conditions and deductibles.

A. Physical damage insurance. If you obtain physical damage insurance, the coverages, terms and premiums for these terms are set forth below.

Coverage	Term in Months	Premium
Collision	___	☐$_____
Comprehensive	___	☐$_____
Fire, Theft, and Combined Additional Coverage	___	☐$_____
Other	___	☐$_____

B. Optional coverages with physical damage insurance. If I have chosen this insurance, the premiums for the initial _____ month term are itemized below. ***[Note: Alternatively, these optional coverages may be disclosed as part of Figure: 7 TAC §84.808(12).]***

☐$_____ Towing and Labor Costs Reimbursement ☐$_____ Rental Reimbursement

☐$_____ Other:_____

If the box next to a premium for an insurance coverage included above is marked, that premium is not fixed or approved by the Texas Insurance Commissioner. If the premium is for a required coverage, I have the option, for a period of 10 days from the date I receive a copy of this contract, of furnishing that coverage through existing policies of insurance or by obtaining like coverage from any insurance company authorized to do business in Texas.

I agree to purchase the above checked coverages.
Buyer's Signature: _____ Date: _____

Figure: 7 TAC §84.808(12)(A)

MODEL CLAUSE FOR OPTIONAL INSURANCE COVERAGES AND DEBT CANCELLATION AGREEMENT

Optional insurance coverages and debt cancellation agreement. The granting of credit will not be dependent on the purchase of either the insurance coverages or the debt cancellation agreement described below. It will not be provided unless I sign and agree to pay the extra cost. [***At creditor's option, the following may be added:***] The credit approval process will not be affected by whether or not I buy these insurance coverages or the debt cancellation agreement. [*Note: If this form is used for commercial transactions, a creditor has the option to bold the language in the preceding paragraph.*]

Coverage	Term in Months	Premium or Fee
GAP*	_____	☐ $_____
Invol. Unemployment	_____	☐ $_____
Debt Cancellation Agreement**	_____	$_____
Liability Insurance	_____	☐ $_____

$_____ per person $_____ property damage
$_____ per accident

*If the motor vehicle is determined to be a total loss, GAP Insurance will pay you the difference between the proceeds of my basic collision policy and the amount I owe on the motor vehicle, minus my deductible. I can cancel that insurance without charge for 10 days from the date of this contract.

**YOU WILL CANCEL CERTAIN AMOUNTS I OWE UNDER THIS CONTRACT IN THE CASE OF A TOTAL LOSS OR THEFT OF THE VEHICLE AS STATED IN THE DEBT CANCELLATION AGREEMENT. I can cancel the debt cancellation agreement without charge for a period of 30 days from the date of this contract, or for the period stated in the debt cancellation agreement, whichever period ends later.

If the box next to a premium for an insurance coverage included above is marked, that premium is not fixed or approved by the Texas Insurance Commissioner. A debt cancellation agreement is not insurance and is regulated by the Office of Consumer Credit Commissioner.

For the premiums or fees included above, I want the related optional coverages and debt cancellation agreement.

Buyer's Signature: _____ Date: _____

[***Note: A creditor who does not routinely finance optional coverages, or does not finance them in a particular transaction, may omit this figure. A creditor may also delete those portions of the figure that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.***]

Figure: 7 TAC §84.808(13)

MODEL CLAUSE FOR OPTIONAL CREDIT LIFE AND ACCIDENT AND HEALTH (DISABILITY) INSURANCE

Optional credit life and credit disability insurance. Credit life insurance and credit disability insurance are not required to obtain credit. They will not be provided unless I sign and agree to pay the extra cost. [***At creditor's option, the following may be added:***] My decision to buy or not buy these insurance coverages will not be a factor in the credit approval process.

☐Credit Life, one buyer	$_____	☐Credit Life, both buyers	$_____	Term _____
☐Credit Disability, one buyer	$_____	☐Credit Disability, both buyers	$_____	Term _____

[***Optional additional sentence for balloon payment contracts:***] Credit Life Insurance is for the scheduled term of this contract. Credit Disability Insurance covers the first ____ payments and does not cover the last scheduled payment. [***Optional additional language for true daily earnings method contracts:***] Credit life insurance pays only the amount I would owe if I paid all my payments on time. Credit disability insurance does not cover any increase in my payment or in the number of payments.

If the term of the insurance is 121 months or longer, the premium is not fixed or approved by the Texas Insurance Commissioner.

I want the insurance indicated above.
Buyer's Signature: _____ Date: _____
Co-Buyer's Signature: _____ Date: _____

[***Note: A creditor who does not routinely finance these coverages, or does not finance them in a particular transaction, may omit this figure. A creditor may also delete those portions of the figure that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.***]

Figure: 7 TAC §84.809(b)

MOTOR VEHICLE RETAIL INSTALLMENT SALES CONTRACT

(Optional: DATE _____)

BUYER _____
ADDRESS _____
CITY _____ STATE _____ ZIP _____
PHONE _____

SELLER/CREDITOR _____
ADDRESS _____
CITY _____ STATE _____ ZIP _____
PHONE _____

The Buyer is referred to as "I" or "me." The Seller is referred to as "you" or "your." This contract may be transferred by the Seller.

PROMISE TO PAY

The credit price is shown below as the "Total Sales Price." The "Cash Price" is also shown below. By signing this contract, I choose to purchase the motor vehicle on credit according to the terms of this contract. I agree to pay you the Amount Financed, Finance Charge, and any other charges in this contract. I agree to make payments according to the Payment Schedule in this contract. If more than one person signs as a buyer, I agree to keep all the promises in this agreement even if the others do not.

I have thoroughly inspected, accepted, and approved the motor vehicle in all respects.

MOTOR VEHICLE IDENTIFICATION

Stock No.	Year	Make	Model	Vehicle Identification Number	License Number (if applicable)	☐ New ☐ Demonstrator ☐ Factory Official/Executive ☐ Used	USE FOR WHICH PURCHASED ☐ PERSONAL, FAMILY OR HOUSEHOLD ☐ BUSINESS OR COMMERCIAL ☐ AGRICULTURAL

Trade-in: Year_____ Make_____ Model_____ VIN_____ License No._____

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate.	**FINANCE CHARGE** The dollar amount the credit will cost me.	**Amount Financed** The amount of credit provided to me or on my behalf.	**Total of Payments** The amount I will have paid after I have made all payments as scheduled.	**Total Sale Price** The total cost of my purchase on credit, including down payment of $_____
%	$	$	$	$

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Security: You will have a security interest in the motor vehicle being purchased.

Late Charge: **[True daily earnings:]** (Option A:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge at the rate of _____% per year on the past due amount. The late charge on the past due amount will be earned from the due date to the date that it is paid. (Option B:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge of _____% of the scheduled payment. **[Scheduled installment earnings method or sum of the periodic balances:]** (Option A:) If I do not pay my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge on the past due amount at the contract rate. (Option B:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge at the rate of _____% per year on the late amount. The late charge on the past due amount will be earned from the due date to the date that it is paid. (Option C:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge of _____% of the scheduled payment.

Prepayment: **[True daily earnings method:]** If I pay all that I owe early, I will not have to pay a penalty. **[Sum of the periodic balances method:]** I can pay all that I owe early. If I do so, I can get a refund of part of the Finance Charge.

Additional information: I will refer to this document for information about nonpayment, default, security interests, any required repayment in full before the scheduled date, and prepayment refunds.

ITEMIZATION OF AMOUNT FINANCED

1. Cash price [Optional additional description: "(including any accessories, services, and taxes)"] $_____(1)

2. Downpayment =
[*If netting add*: (if negative, enter "0" and see Line 4.A. below)]
Gross trade-in $_____
- payoff by Seller $_____
= net trade-in $_____
[*If not netting add*: (if negative enter "0" and see Line 4.A. below)]
+ cash $_____
+ Mfrs. Rebate $_____
+ other (describe) _____ $_____
Total downpayment $_____(2)

3. Unpaid balance of cash price (1 minus 2) $_____(3)

4. Other charges including amounts paid to others on my behalf (Seller may keep part of these amounts.):
   A. Net trade-in payoff [*Alternative caption*: "prior credit or lease balance"] to _____ $_____
   B. Cost of physical damage insurance paid to insurance company $_____
   C. Cost of optional coverages with physical damage insurance paid to insurance company $_____
   D. Cost of optional credit insurance paid to insurance company or companies $_____
      Life
      Disability
   E. Debt cancellation agreement fee paid to the Seller $_____
   F. Official fees paid to government agencies $_____
   G. Dealer's inventory tax [*Optional addition*: (if not included in cash price)] $_____
   H. Sales tax [*Optional addition*: (if not included in cash price)] $_____
   I. Other taxes [*Optional addition*: (if not included in cash price)] $_____
   J. Government license and/or registration fees $_____
   K. Government certificate of title fee $_____
   L. Government vehicle inspection fees $_____
   M. Deputy service fee paid to dealer $_____
   N. **Documentary fee. A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents relating to the sale. A documentary fee may not exceed a reasonable amount agreed to by the parties. This notice is required by law. [*Option to insert Spanish translation of disclosure here.*]** $_____
   O. Other charges (Seller must identify who is paid and describe purpose)
      to_____for_____ $_____
      to_____for_____ $_____
      to_____for_____ $_____
   Total other charges and amounts paid to others on my behalf $_____(4)

5. **Amount Financed** (3 + 4) $_____(5)

[*Optional caption*: Taxes, title fee, license fee, and any state inspection fee (*except for $7.00 of each such inspection fee that will be retained by Seller*) will be paid by Seller to government agencies. Documentary fee and deputy service fee will be retained by Seller and the Seller may also retain part or all of the insurance, service contracts, and other charges.]

[Note: A creditor may delete portions of the figure applicable to any insurance premiums or debt cancellation fees that are not financed in the contract and may also delete other inapplicable portions. Under item 4, a creditor may add a line for "other insurance paid to insurance company."]

DEFERRED DOWNPAYMENT(S)	
AMOUNT	**DATE DUE**

MODEL CLAUSE FOR PHYSICAL DAMAGE INSURANCE

PROPERTY INSURANCE: I must keep the collateral insured against damage or loss in the amount I owe. I must keep this insurance until I have paid all that I owe under this contract. I may obtain property insurance from anyone I want or provide proof of insurance I already have. The insurer must be authorized to do business in Texas. I agree to give you proof of property insurance. I must name you as the person to be paid under the policy in the event of damage or loss.

[Note: The following optional provisions are included for creditors who finance physical damage insurance. Creditors who do not routinely finance physical damage coverage, or who are not financing it in a particular transaction, may delete the remaining disclosures in this figure. A creditor may also delete those portions below that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.]

If any insurance is included below, policies or certificates from the insurance company will describe the terms, conditions and deductibles.

A. Physical damage insurance. If you obtain physical damage insurance, the coverages, terms and premiums for these terms are set forth below.

Coverage	Term in Months	Premium
Collision	___	☐$_____
Comprehensive	___	☐$_____
Fire, Theft, and Combined Additional Coverage	___	☐$_____
Other	___	☐$_____

B. Optional coverages with physical damage insurance. If I have chosen this insurance, the premiums for the initial _____ month term are itemized below. ***[Note: Alternatively, these optional coverages may be disclosed as part of Figure: 7 TAC §84.808(12).]***

☐$_____ Towing and Labor Costs Reimbursement ☐$_____ Rental Reimbursement

☐$_____ Other:_____

If the box next to a premium for an insurance coverage included above is marked, that premium is not fixed or approved by the Texas Insurance Commissioner. If the premium is for a required coverage, I have the option, for a period of 10 days from the date I receive a copy of this contract, of furnishing that coverage through existing policies of insurance or by obtaining like coverage from any insurance company authorized to do business in Texas.

I agree to purchase the above checked coverages.

Buyer's Signature: _____ Date: _____

MODEL CLAUSE FOR OPTIONAL INSURANCE COVERAGES AND DEBT CANCELLATION AGREEMENT

Optional insurance coverages and debt cancellation agreement. The granting of credit will not be dependent on the purchase of either the insurance coverages or the debt cancellation agreement described below. It will not be provided unless I sign and agree to pay the extra cost. ***[At creditor's option, the following may be added:]*** The credit approval process will not be affected by whether or not I buy these insurance coverages or the debt cancellation agreement. *[Note: If this form is used for commercial transactions, a creditor has the option to bold the language in the preceding paragraph.]*

Coverage	Term in Months	Premium or Fee
GAP*	_____	☐ $_____
Invol. Unemployment	_____	☐ $_____
Debt cancellation agreement**	_____	$_____
Liability Insurance	_____	☐ $_____

$_____ per person $_____ property damage
$_____ per accident

*If the motor vehicle is determined to be a total loss, GAP Insurance will pay you the difference between the proceeds of my basic collision policy and the amount I owe on the motor vehicle, minus my deductible. I can cancel that insurance without charge for 10 days from the date of this contract.

**YOU WILL CANCEL CERTAIN AMOUNTS I OWE UNDER THIS CONTRACT IN THE CASE OF A TOTAL LOSS OR THEFT OF THE VEHICLE AS STATED IN THE DEBT CANCELLATION AGREEMENT. I can cancel the debt cancellation agreement without charge for a period of 30 days from the date of this contract, or for the period stated in the debt cancellation agreement, whichever period ends later.

If the box next to a premium for an insurance coverage included above is marked, that premium is not fixed or approved by the Texas Insurance Commissioner. A debt cancellation agreement is not insurance and is regulated by the Office of Consumer Credit Commissioner.

For the premiums or fees included above, I want the related optional coverages and debt cancellation agreement.

Buyer's Signature: _____ Date: _____

[Note: A creditor who does not routinely finance optional coverages, or does not finance them in a particular transaction, may omit this figure. A creditor may also delete those portions of the figure that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.]

MODEL CLAUSE FOR OPTIONAL CREDIT LIFE AND ACCIDENT AND HEALTH (DISABILITY) INSURANCE

Optional credit life and credit disability insurance. Credit life insurance and credit disability insurance are not required to obtain credit. They will not be provided unless I sign and agree to pay the extra cost. [***At creditor's option, the following may be added:***] My decision to buy or not buy these insurance coverages will not be a factor in the credit approval process.

☐Credit Life, one buyer	$_____	☐Credit Life, both buyers	$_____	Term _____
☐Credit Disability, one buyer	$_____	☐Credit Disability, both buyers	$_____	Term _____

[***Optional additional sentence for balloon payment contracts:***] Credit Life Insurance is for the scheduled term of this contract. Credit Disability Insurance covers the first ____ payments and does not cover the last scheduled payment. [***Optional additional language for true daily earnings method contracts:***] Credit life insurance pays only the amount I would owe if I paid all my payments on time. Credit disability insurance does not cover any increase in my payment or in the number of payments.

If the term of the insurance is 121 months or longer, the premium is not fixed or approved by the Texas Insurance Commissioner.

I want the insurance indicated above.

Buyer's Signature: _____ Date: _____

Co-Buyer's Signature: _____ Date: _____

[***Note: A creditor who does not routinely finance these coverages, or does not finance them in a particular transaction, may omit this figure. A creditor may also delete those portions of the figure that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.***]

LIABILITY INSURANCE

(OPTION A) THIS CONTRACT DOES NOT INCLUDE INSURANCE COVERAGE FOR PERSONAL LIABILITY AND PROPERTY DAMAGE CAUSED TO OTHERS.

(OPTION B) UNLESS A CHARGE FOR LIABILITY INSURANCE IS INCLUDED IN THE ITEMIZATION OF AMOUNT FINANCED, LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED IN THIS CONTRACT.

(OPTION C) UNLESS A CHARGE FOR LIABILITY INSURANCE IS INCLUDED IN THE ITEMIZATION OF AMOUNT FINANCED, ANY INSURANCE REFERRED TO IN THIS CONTRACT DOES NOT INCLUDE COVERAGE FOR PERSONAL LIABILITY AND PROPERTY DAMAGE CAUSED TO OTHERS.

Any change to this contract must be in writing. Both you and I must sign it. No oral changes to this contract are enforceable.

_____Buyer _____Co-Buyer

HOW YOU FIGURE THE FINANCE CHARGE

[**Regular transaction using sum of the periodic balances method:**] (Option A_1: Sales Tax Advance) You figure the Finance Charge using the add-on method as defined by the Texas Finance Commission Rule. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance and added as a lump sum to the unpaid principal balance for the full term of the contract. (Option A_2: Sales Tax Advance) The Finance Charge will be calculated by using the add-on method. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance and added as a lump sum to the unpaid principal balance for the full term of the contract. The add-on Finance Charge is calculated at a rate of $____ per $100.00. (Option B: Deferred Sales Tax) The Finance Charge will be calculated by using the add-on method. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance subject to a finance charge and added as a lump sum to the unpaid principal balance subject to a Finance Charge for the full term of the contract. The add-on finance charge is calculated at a rate of $____ per $100.00.

[**True daily earnings method:**] (Option A_1: Sales Tax Advance) You figure the Finance Charge using the true daily earnings method as defined by the Texas Finance Code. Under the true daily earnings method, the Finance Charge will be figured by applying the daily rate to the unpaid portion of the Amount Financed for the number of days the unpaid portion of the Amount Financed is outstanding. The daily rate is 1/365th of the Annual Percentage Rate. The unpaid portion of the Amount Financed does not include late charges or returned check charges. (Option A_2: Sales Tax Advance) The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance. The daily rate is 1/365th of the contract rate. The unpaid principal balance does not include the late charges or returned check charges. (Option B: Deferred Sales Tax) The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance subject to a Finance Charge. The daily rate is 1/365th of the contract rate. The unpaid principal balance subject to a finance charge does not include the late charges, sales tax, or returned check charges.

[**Scheduled installment earnings method:**] (Option A_1: Sales Tax Advance) You figure the Finance Charge using the scheduled installment earnings method as defined by the Texas Finance Code. Under the scheduled installment earnings method, the Finance Charge is figured by applying the daily rate to the unpaid portion of the Amount Financed as if each payment will be made on its scheduled payment date. The daily rate is 1/365th of the Annual Percentage Rate. The unpaid portion of the Amount Financed does not include late charges or returned check charges. (Option A_2: Sales Tax Advance) The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance. You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. The unpaid principal balance does not include the late charges or returned check charges. (Option B: Deferred Sales Tax) The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You figured the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance subject to a Finance Charge. You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. The unpaid principal balance subject to a Finance Charge does not include the late charges, sales tax, or returned check charges.

CONSUMER WARNING

[Scheduled Installment Earnings Method:] Notice to the buyer - I will not sign this contract before I read it or if it contains any blank spaces. I am entitled to a copy of the contract I sign. Under the law, I have the right to pay off in advance all that I owe and under certain conditions may obtain a partial refund of the finance charge. I will keep this contract to protect my legal rights.

[True Daily Earnings Method:] Notice to the buyer - I will not sign this contract before I read it or if it contains any blank spaces. I am entitled to a copy of the contract I sign. Under the law, I have the right to pay off in advance all that I owe and under certain conditions may save a portion of the finance charge. I will keep this contract to protect my legal rights.

BUYER'S ACKNOWLEDGEMENT OF CONTRACT RECEIPT

(OPTION A: **If the buyer's signature is dated)** I AGREE TO THE TERMS OF THIS CONTRACT. WHEN I SIGN THE CONTRACT, I WILL RECEIVE THE COMPLETED CONTRACT. IF NOT, I UNDERSTAND THAT A COPY WILL BE MAILED TO ME WITHIN A REASONABLE TIME.

(OPTION B: **If the buyer's signature is not dated)** I AGREE TO THE TERMS OF THIS CONTRACT. I CONFIRM THAT BEFORE I SIGNED THIS CONTRACT, YOU GAVE IT TO ME, AND I WAS FREE TO TAKE IT AND REVIEW IT. I RECEIVED THE COMPLETED CONTRACT ON _____ (MO.) (DAY) (YR.)

(OPTION C: **If the buyer's signature is not dated)** I SIGNED THIS CONTRACT ON _____ AND A COPY WILL BE MAILED TO ME WITHIN A REASONABLE TIME.

(OPTION D: **If the buyer's signature is dated or not dated)** I AGREE TO THE TERMS OF THIS CONTRACT AND ACKNOWLEDGE RECEIPT OF A COMPLETED COPY OF IT. I CONFIRM THAT BEFORE I SIGNED THIS CONTRACT, YOU GAVE IT TO ME, AND I WAS FREE TO TAKE IT AND REVIEW IT.

_____	_____	_____	_____
Buyer	Date	Seller	Date
_____	_____		
Co-Buyer	Date		

THIS CONTRACT IS NOT VALID UNTIL YOU AND I SIGN IT.

CONSUMER CREDIT COMMISSIONER NOTICE. To contact (insert authorized business name of retail seller, creditor or holder as appropriate) about this account, call (insert telephone number of retail seller, creditor, or holder as appropriate). This contract is subject in whole or in part to Texas law which is enforced by the Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207; www.occc.state.tx.us; (800) 538-1579, and can be contacted relative to any inquiries or complaints.

OTHER TERMS AND CONDITIONS

[Sum of the periodic balances method and scheduled installment earnings method:] HOW YOU CALCULATE MY FINANCE CHARGE REFUND IF I PREPAY If I prepay in full, I may be entitled to a refund of part of the Finance Charge. **[Sum of the periodic balances method:]** You will figure the Finance Charge refund by using the sum of the periodic balances method as defined by the Texas Finance Commission rule. (Optional: You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule. The Finance Charge Refund will be computed upon the entire Finance Charge minus the Acquisition Cost. I will not get a refund if it is less than $1.00.) (Additional Option for heavy commercial vehicle: You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule. The Finance Charge refund will be computed based upon the entire Finance Charge calculated using the sum of the periodic balances method. Then you will subtract the Acquisition Cost from that amount. I will not get a refund if it is less than $1.00.) **[Scheduled installment earnings method:]** You will figure the Finance Charge refund by the scheduled installment earnings method as defined by the Texas Finance Commission rule. (Optional: You will figure my refund by deducting earned finance charges from the Finance Charge. You will figure earned finance charges by applying a daily rate to the unpaid principal balance as if I paid all my payments on the date due. If I prepay between payment due dates, you will figure earned finance charges for the partial payment period. You do this by counting the number of days from the due date of the prior payment through the date I prepay. You then multiply that number of days times the daily rate. The daily rate is 1/365th of the Annual Percentage Rate. You will also add the acquisition cost of $25 (or $150 for a heavy commercial vehicle) to the earned finance charge. I will not get a refund if it is less than $1.00.) **[Flexible contract forms designed to accommodate alternative methods:]** You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule if: this contract is a Regular Payment Contract as defined by the Texas Finance Commission rule, and this contract does not have a term greater than 61 months. If this contract is not a Regular Payment Contract or if it has a term greater than 61 months, you will figure the Finance Charge refund using the scheduled installment earnings method as defined by the Texas Finance Commission rule. I will not get a refund if it is less.than $1.00.

HOW YOU WILL APPLY MY PAYMENTS [True daily earnings method:] You will apply my payments in the following order:

1. earned but unpaid finance charge; and
2. anything else I owe under this agreement.

HOW LATE OR EARLY PAYMENTS CHANGE WHAT I MUST PAY [True daily earnings method:] You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. If I do not timely make all my payments in at least the correct amount, I will have to pay more Finance Charge and my last payment will be more than my final scheduled payment. If I make scheduled payments early, my Finance Charge will be reduced (less). If I make my scheduled payments late, my Finance Charge will increase.

INTEREST AFTER MATURITY If I don't pay all I owe when the final payment becomes due, or I do not pay all I owe if you demand payment in full under this contract, I will pay an interest charge on the amount that is still unpaid. That interest charge will be the higher rate of 18% per year or the maximum rate allowed by law, if that rate is higher. The interest charge for this amount will begin the day after the final payment becomes due.

SPECIAL PROVISIONS FOR BALLOON PAYMENT CONTRACTS A balloon payment is a scheduled payment more than twice the amount of the average of my scheduled payments, other than the downpayment, that are due before the balloon payment.

(Paying the balloon payment under Texas Finance Code §348.123(a)) I can pay all I owe when the balloon payment is due and keep my motor vehicle.

(Option A: Refinancing the balloon payment) If I buy the motor vehicle primarily for personal, family, or household use, I can enter into a new written agreement to refinance the balloon payment when due without a refinancing fee. If I refinance the balloon payment, my periodic payments will not be larger or more often than the payments in this contract. The annual percentage rate in the new agreement will not be more than the Annual Percentage Rate in this contract. This provision does not apply if my Payment Schedule has been adjusted to my seasonal or irregular income.

(Option B: Special right to refinance balloon payment under Texas Finance Code §348.123(b)(5)(b)(iii)) I can enter into a new agreement to refinance my last installment if I am not in default. I can refinance at an annual percentage rate up to 5 points greater than the Annual Percentage Rate shown in this contract. The rate will not be more than applicable law allows. The new agreement will allow me to refinance the last installment for at least 24 months with equal monthly payments. You and I can also agree to refinance the last installment over another time period or on a different payment schedule.

AGREEMENT TO KEEP MOTOR VEHICLE INSURED I agree to have physical damage insurance covering loss or damage to the vehicle for the term of this contract. The insurance must cover your interest in the vehicle. (Optional Language Provision: The insurance must include collision coverage and either comprehensive or fire, theft, and combined additional coverage.)

YOUR RIGHT TO PURCHASE REQUIRED INSURANCE IF I FAIL TO KEEP THE MOTOR VEHICLE INSURED If I fail to give you proof that I have insurance, you may buy physical damage insurance. You may buy insurance that covers my interest and your interest in the motor vehicle, or you may buy insurance that covers your interest only. I will pay the premium for the insurance and a finance charge at the contract rate. If you obtain collateral protection insurance, you will mail notice to my last known address shown in your file.

PHYSICAL DAMAGE INSURANCE PROCEEDS I must use physical damage insurance proceeds to repair the motor vehicle, unless you agree otherwise in writing. However, if the motor vehicle is a total loss, I must use the insurance proceeds to pay what I owe you. I agree that you can use any proceeds from insurance to repair the motor vehicle, or you may reduce what I owe under this contract. If you apply insurance proceeds to the amount I owe, they will be applied to my payments in the reverse order of when they are due. If my insurance on the motor vehicle or credit insurance doesn't pay all I owe, I must pay what is still owed. Once all amounts owed under this contract are paid, any remaining proceeds will be paid to me.

RETURNED INSURANCE PREMIUMS AND SERVICE CONTRACT CHARGES **[True daily earnings method:]** If you get a refund on insurance or service contracts, or other contracts included in the cash price, you will subtract it from what I owe. Once all amounts owed under this contract are paid, any remaining refunds will be paid to me. **[Scheduled installment earnings method or sum of the periodic balances:]** If you get a refund of insurance or service contract charges, you will apply it and the unearned finance charges on it in the reverse order of the payments to as many of my payments as it will cover. Once all amounts owed under this contract are paid, any remaining refunds will be paid to me.

APPLICATION OF CREDITS Any credit that reduces my debt will apply to my payments in the reverse order of when they are due, unless you decide to apply it to another part of my debt. The amount of the credit and all finance charge or interest on the credit will be applied to my payments in the reverse order of my payments.

TRANSFER OF RIGHTS You may transfer this contract to another person. That person will then have all your rights, privileges, and remedies.

SECURITY INTEREST To secure all I owe on this contract and all my promises in it, I give you a security interest in:

- the motor vehicle including all accessories and parts now or later attached (Optional: and any other goods financed in this contract);
- all insurance proceeds and other proceeds received for the motor vehicle;
- any insurance policy, service contract or other contract financed by you and any proceeds of those contracts; and
- any refunds of charges included in this contract for insurance, or service contracts.

This security interest also secures any extension or modification of this contract. The certificate of title must show your security interest in the motor vehicle.

USE AND TRANSFER OF THE MOTOR VEHICLE I will not sell or transfer the motor vehicle without your written permission. If I do sell or transfer the motor vehicle, this will not release me from my obligations under this contract, and you may charge me a transfer of equity fee of $25 ($50 for a heavy commercial vehicle). I will promptly tell you in writing if I change my address or the address where I keep the motor vehicle. I will not remove the motor vehicle (Optional: motor vehicle or other collateral) from Texas for more than 30 days unless I first get your written permission.

CARE OF THE MOTOR VEHICLE I agree to keep the motor vehicle free from all liens and claims except those that secure this contract. I will timely pay all taxes, fines, or charges pertaining to the motor vehicle. I will keep the motor vehicle in good repair. I will not allow the motor vehicle to be seized or placed in jeopardy or use it illegally. I must pay all I owe even if the motor vehicle is lost, damaged or destroyed. If a third party takes a lien or claim against or possession of the motor vehicle, you may pay the third party any cost required to free the motor vehicle from all liens or claims. You may immediately demand that I pay you the amount paid to the third party for the motor vehicle. If I do not pay this amount, you may repossess the motor vehicle and add that amount to the amount I owe. If you do not repossess the motor vehicle, you may still demand that I pay you, but you cannot compute a finance charge on this amount.

DEFAULT I will be in default if:

- I do not pay any amount when it is due;
- I break any of my promises in this agreement;
- I allow a judgment to be entered against me or the collateral; or
- I file bankruptcy, bankruptcy is filed against me, or the motor vehicle becomes involved in a bankruptcy.

If I default, you can exercise your rights under this contract and your other rights under the law.

LATE CHARGE I will pay you a late charge as agreed to in this contract when it accrues.

REPOSSESSION If I default, you may repossess the motor vehicle from me if you do so peacefully. If any personal items are in the motor vehicle, you can store them for me and give me written notice at my last address shown on your records within 15 days of discovering that you have my personal items. If I do not ask for these items back within 31 days from the day you mail or deliver the notice to me, you may dispose of them as applicable law allows. Any accessory, equipment, or replacement part stays with the motor vehicle.

MY RIGHT TO REDEEM If you take my motor vehicle, you will tell me how much I have to pay to get it back. If I do not pay you to get the motor vehicle back, you can sell it or take other action allowed by law. My right to redeem ends when the motor vehicle is sold or you have entered into a contract for sale or accepted the collateral as full or partial satisfaction of a contract.

DISPOSITION OF THE MOTOR VEHICLE If I don't pay you to get the motor vehicle back, you can sell it or take other action allowed by law. You will send me notice at least 10 days before you sell it. You can use the money you get from selling it to pay allowed expenses and to reduce the amount I owe. Allowed expenses are expenses you pay as a direct result of taking the motor vehicle, holding it, preparing it for sale, and selling it. If any money is left, you will pay it to me unless you must pay it to someone else. If the money from the sale is not enough to pay all I owe, I must pay the rest of what I owe you plus interest. If you take or sell the motor vehicle, I will give you the certificate of title and any other document required by state law to record transfer of title.

COLLECTION COSTS If you hire an attorney who is not your employee to enforce this contract, I will pay reasonable attorney's fees and court costs as the applicable law allows.

CANCELLATION OF OPTIONAL INSURANCE AND SERVICE CONTRACTS This contract may contain charges for insurance or service contracts or for services included in the cash price. If I default, I agree that you can claim benefits under these contracts to the extent allowable, and terminate them to obtain refunds of unearned charges to reduce what I owe or repair the motor vehicle.

YOUR RIGHT TO DEMAND PAYMENT IN FULL If I default, or you believe in good faith that I am not going to keep any of my promises, you can demand that I immediately pay all that I owe. You don't have to give me notice that you are demanding or intend to demand immediate payment of all that I owe.

IF YOU DEMAND I PAY ALL I OWE [**Sum of the periodic balances method or scheduled installment earnings method**:] If you demand that I pay you all that I owe, you will give me a credit of part of the Finance Charge as if I had prepaid in full.

INTEGRATION AND SEVERABILITY CLAUSE This contract contains the entire agreement between you and me relating to the sale and financing of the motor vehicle. If any part of this contract is not valid, all other parts stay valid.

LEGAL LIMITATIONS ON YOUR RIGHTS If you don't enforce your rights every time, you can still enforce them later. You will exercise all of your rights in a lawful way. I don't have to pay finance charge or other amounts that are more than the law allows. This provision prevails over all other parts of this contract and over all your other acts.

APPLICABLE LAW Federal law and Texas law apply to this contract.

SELLER'S DISCLAIMER OF WARRANTIES **Unless the seller makes a written warranty, or enters into a service contract within 90 days from the date of this contract, the seller makes no warranties, express or implied, on the motor vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose. This provision does not affect any warranties covering the motor vehicle that the motor vehicle manufacturer may provide.**

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER. (This provision applies to this contract only if the motor vehicle financed in the contract was purchased for personal, family, or household use.)

The rates of this contract are negotiable. The seller may assign or otherwise sell this contract and receive a discount or other payment for the difference between the rate, charges, or balance.

In this box only, the word "you" refers to the Buyer.

Used Car Buyers Guide. The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.
Spanish Translation:

Guía para compradors de vehículos usados. La información que ve en el formulario de la ventanilla para este vehículo forma parte del presente contrato. La información del formulario de la ventanilla deja sin efecto toda disposición en contrario contenida en el contrato de venta.

Figure: 25 TAC §217.1(68)(A)

Temperature	Time
Batch Pasteurization	
63°C (145°F)*	30 minutes
Continuous Flow Pasteurization (HTST, HHST)	
72°C (161°F)*	15 seconds
89°C (191°F)	1.0 second
90°C (194°F)	0.5 seconds
94°C (201°F)	0.1 seconds
96°C (204°F)	0.05 seconds
100°C (212°F)	0.01 seconds

*If the fat content of the milk product is ten percent (10%) or greater, or contains a total solids of 18% or greater, or contains added sweeteners, or is concentrated (condensed), the specified temperature shall be increased by 3°C (5°F).

Figure: 25 TAC §217.1(68)(B)

Temperature	Time
Batch Pasteurization	
69°C (155°F)	30 minutes
Continuous Flow Pasteurization (HTST)	
80°C (175°F)	25 seconds
83°C (180°F)	15 seconds

Figure: 25 TAC §217.45(g)(1)

	Bacteria	Coliform	Temperature
Mix	50,000/ml	40/ml	45° F
Frozen Dessert	50,000/ml	40/ml	45° F

Figure: 25 TAC §217.45(g)(2)

	Bacteria	Coliform	Temperature
Nondairy Frozen Desserts	50,000/ml	40/ml	45° F
Nondairy Frozen Desserts Mix (Dry)	1,000/ml	10/ml	------

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas State Affordable Housing Corporation

Notice of Funding Availability

The Texas State Affordable Housing Corporation is giving Notice of Funding Availability for the 2009 cycle of the Texas Foundations Fund. The mission of the Texas Foundations Fund is to improve the living standards of Texas residents of very low and extremely low income by providing grants to build new single family homes, repair existing owner-occupied single family homes, enhance accessibility for the elderly and disabled, and provide supportive housing services for residents of multifamily rental units. Funding availability for this cycle is $250,000, up to $50,000 per grant, to a Nonprofit Entity or a Rural Government Entity. All grants for Eligible Projects shall be subject to the Texas Foundations Fund Guidelines and NOFA and Proposal Checklist which may be found on the Corporation's website at www.tsahc.org.

TRD-200904763
David Long
President
Texas State Affordable Housing Corporation
Filed: October 19, 2009

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Office of the Attorney General

Texas Water Code Settlement Notice

Notice is hereby given by the State of Texas of the following proposed settlement of a lawsuit brought under the Texas Health and Safety Code. Before the State may settle a judicial enforcement action under the Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: *Harris County and the State of Texas v. Texas Tire Recycling, Inc., and Kevin Martinolich,* Cause No. 2006-10165 in the 295th Judicial District Court, Harris County, Texas.

Nature of Defendants' Operations: Texas Tire Recycling, Inc. ("TTR") owned and/or operated a tire recycling facility near Baytown, Harris County Texas. Harris County filed suit to enforce state regulatory laws relating to solid waste and tire recycling. The State was joined as a necessary and indispensable party plaintiff. The parties reached agreement on an Agreed Final Judgment ("AFJ") on October 19, 2009.

Proposed Agreed Final Judgment: The parties now seek to file the AFJ for court approval. The AFJ requires TTR to pay $50,000.00 in civil penalties to Harris County and the State of Texas, or in lieu thereof, to perform a supplemental environmental project ("SEP") approved by the State. In addition, TTR will pay $3,000.00 to Harris County in court costs and attorneys fees, or perform an equal amount of in-kind work as part of the approved SEP. TTR will also pay $2,000.00 in court costs and attorneys fees to the State. A SEP has been approved by the State which requires TTR to remove 334 tons of scrap tires from a site at 706 Old Genoa-Red Bluff Road, Houston, Texas and recycle or legally dispose of the removed scrap.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Tom Bohl, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0052. Written comments must be received within 30 days of publication of this notice to be considered.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-200904785
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: October 20, 2009

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of October 9, 2009, through October 15, 2009. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on October 21, 2009. The public comment period for this project will close at 5:00 p.m. on November 20, 2009.

FEDERAL AGENCY ACTIONS:

Applicant: Nueces County; Location: The project can be located on U.S.G.S quadrangle maps entitled: Port Aransas, TX, Crane Islands NW, TX, and Crane Islands SW, TX. The approximate geographical coordinates for each stretch of beach in NAD 83, UTM (meters), Zone 14, are as follows: Approximate coordinates at the northern limit (south jetty) of Section 1 (one-mile stretch) are: Northing: 3080412 Easting: 692548; Approximate coordinates at the southern limit (Lantana Rd.) of Section 1 are: Northing 3079064; Easting: 691162. Approximate geographical coordinates at the northern limit (Newport Access Road) of Section 2 (.79 mile stretch) are: Northing: 3057758; Easting: 678219. Approximate geographical coordinates at the southern limit (Marker 203) of Section 2 are: Northing: 3056029; Easting: 677368.

Approximate geographical coordinates at the northern limit (Access Road 4) of Section 3 (1.19 mile stretch) are: Northing: 3054074; Easting: 676610. Approximate geographical coordinates of the southern limit of Section 3 are: Northing: 3051933; Easting: 675569. Project Description: The applicant, Nueces County, proposes to conduct beach maintenance activities along three discrete sections of beach within the County's jurisdiction. The purpose of this project is for the applicant to conduct beach maintenance activities associated with the periodic removal of debris from the public beach and to preserve public vehicular access to the beach. CCC Project No.: 10-0003-F1. Type of Application: U.S.A.C.E. permit application # SWG-2008-01272 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: White Stallion Energy Center, LLC.; Location: The proposed project is located adjacent to the Colorado River (mile marker 14) off County Road 2668, near Bay City, in Matagorda County, Texas. The project can be located on the U.S.G.S. quadrangle maps entitled: Blessing SE and Wadsworth, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 303969.315; Northing: 3193010.501. Project Description: The applicant proposes to discharge approximately 19,000 cubic yards of clean upland fill material excavated from the site into a total of 8.133 acres of jurisdictional waters of the United States; specifically 2.705 acres of emergent wetlands, 4.95 acres of open water, 0.017 acres of ephemeral stream and 0.461 acres of perennial stream for the construction of 2 outfall structure aprons, 2 barge facility supports with sheet piling and concrete and base material and concrete for a new low-emission solid fuel power plant. CCC Project No.: 10-0007-F1. Type of Application: U.S.A.C.E. permit application #SWG-2009-00945 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy of the consistency certifications for inspection, may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200904801
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: October 21, 2009

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Comptroller of Public Accounts

Notice of Loan Funding Availability and Request for Applications

Pursuant to Chapters 403, 447 and 2305, Texas Government Code; and the American Recovery and Reinvestment Act of 2009, Public Law, PL-111-5 (ARRA or Act); and 10 Code of Federal Regulations (CFR) Parts 420 and 600; Executive Order (EO) RP-72 and related legal authority and regulations, the Comptroller of Public Accounts (Comptroller), State Energy Conservation Office (SECO), announces its Notice of Loan Funding Availability (NOLFA) and Request for Applications (RFA #BE-AG1-2010) and invites applications from eligible interested governmental entities for loan assistance to perform building energy efficiency and retrofit activities through Energy Savings Performance Contracting under the State Energy Plan (SEP). If a loan is made under the terms of the RFA, Grantee will be expected to begin performance of the loan agreement on or about February 1, 2010, or as soon thereafter as practical.

Background: If awarded under the terms of this NOLFA, loans will have a maximum project cap of up to ten million dollars ($10,000,000) to perform energy efficiency and retrofit activities through an Energy Savings Performance Contract, at a low interest rate of 2% and, depending on the project, a payback term of either 10 or 15 years. Approximately $157.7 million total in ARRA funds may be available in the form of the Building Efficiency and Retrofit Program revolving loan fund to increase the efficiency of governmental buildings and facilities throughout the State. The foregoing activities are being pursued in order to create jobs, reduce energy use; reduce energy costs; reduce greenhouse gas emission reductions and assist with installation of additional renewable energy technologies in the State.

Contact: Parties interested in submitting an application should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, in the Issuing Office at: 111 E. 17th St., Room 201, Austin, Texas 78774, (512) 305-8673. This NOLFA and RFA will be available on Friday, October 30, 2009, after 10:00 a.m. Central Zone Time (CZT) and during normal business hours thereafter. The Comptroller will make the application, instructions, and a sample loan agreement and attachments available electronically on the Stimulus Fund website at: http://www.seco.cpa.state.tx.us/arra/ after 10:00 a.m. CZT on Friday, October 30, 2009.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and Non-mandatory Letters of Intent must be received at the above-referenced address not later than 2:00 p.m. CZT on Friday, November 6, 2009. Prospective applicants are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Non-mandatory Letters of Intent must be addressed to William Clay Harris, Assistant General Counsel, Contracts, and be signed by an official of the entity. On or about Friday, November 13, 2009, or as soon thereafter as practical, the Comptroller expects to post responses to the questions received by the deadline on the Stimulus website referenced above. Late Non-mandatory Letters of Intent and Questions will not be considered under any circumstances. Applicants shall be solely responsible for verifying timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Applications must be delivered in the Issuing Office to the attention of the Assistant General Counsel, Contracts, no later than 2:00 p.m. CZT, on December 30, 2009. Late Applications will not be considered under any circumstances; Applicants shall be solely responsible for verifying time receipt of applications in the Issuing Office.

Application Requirements and Eligibility: Eligible Governmental Entities may apply to the Building Efficiency and Retrofit Program, which is a revolving loan program, administered by the Texas Comptroller of Public Accounts (CPA), State Energy Conservation Office (SECO), and is funded by American Recovery and Reinvestment Act (ARRA) grant funds through the Department of Energy, National Energy Technology Laboratory. Applicants must meet eligibility requirements, be able to comply with and expend ARRA grant funds, if awarded, in accordance with the Comptroller and ARRA requirements.

All projects are to be conducted under Energy Savings Performance Contract. For explanation of an Energy Saving Performance Contract please go to: http://www.seco.cpa.state.tx.us/sa_pc.htm. Funds are available to retrofit existing buildings. A building retrofit refers to an improvement to building infrastructure that reduces utility (energy and water) costs. If the retrofit proposed is 50% or greater of a defined space, then it is considered "new construction" and is required to meet the current state energy code. Please see the SECO LoanSTAR Guidelines, Volume I, Section II, C, Classifying Project Types. (http://www.seco.cpa.state.tx.us/ls/ls_guideline.php). Funds are available for new construction if it is previously approved construction development. Financing the incremental cost increase between standard efficiency equipment and high efficiency equipment are eligible but must meet the current state energy code. Applications must be complete, be submitted under signed transmittal letter, include an executive summary, a table of contents, describe the project and personnel qualifications relevant to the evaluation criteria, and must meet the following program requirements:

* The maximum loan amount shall not exceed $10 million dollars.

* The interest rate is set at 2%.

* The term of the loan is for 10-years or less; if at least 10% of the project cost contains renewable energy technologies, the term of the loan may qualify for up to a 15-year payback.

* The project must demonstrate a simple payback period of 10-years or less (or if renewable energy included 15-years or less) to qualify. The individual Energy Cost Reduction Measures (ECRM) must demonstrate a simple payback of less than the ECRM's economic useful life.

* Project expenses will be reimbursed on a "cost reimbursement" basis. No advance of funds is allowed.

* Borrower will be required to comply with federal ARRA requirements including OMB reporting requirements and the Solid Waste Disposal Act, and, if applicable, Davis-Bacon Act and related prevailing wage laws, Buy American provisions, National Environmental Policy Act, and National Historic Preservation Act, Applicants understand and will see that the State Historical Preservation Office (SHPO) is consulted in any project award that may include a building or site of historical importance. In this regard, SHPO guidance will be solicited and followed to insure that the historical significance of the building will be preserved. All requirements are set out in the sample contract available at http://www.secostimulus.org

* SECO will conduct periodic on-site monitoring visits on all building retrofit projects.

* All improvements financed through the Building Efficiency and Retrofit Program shall meet minimum efficiency standards (as prescribed by applicable building energy codes). Examples of projects that are acceptable for ARRA funding are those that may include:

- Building and mechanical system commissioning and optimization.

- Energy management systems and equipment control automation. o High efficiency heating, ventilation and air conditioning systems, boilers, heat pumps and other heating and air conditioning projects.

- High efficiency lighting fixtures and lamps.

- Building Shell Improvements (insulation, adding reflective window film, radiant barriers, and cool roof.)

- Load Management Projects o Energy Recovery Systems o Low flow plumbing fixtures, high efficiency pumps.

- Renewable energy efficiency projects are strongly encouraged wherever feasible, and may include installation of distributed technology such as of rooftop solar water and space heating systems; geothermal heat pumps (only closed loop systems with no greater than 10 ton capacity), or electric generation with photovoltaic or small wind and solar-thermal systems. If there are closed-loop geothermal heat pumps greater than 10 ton capacity involved, then applicants will be responsible for further NEPA review by DOE in the event of an award. If renewable generation greater than 20 KW is involved, applicants will be responsible for further NEPA review by DOE.

Evaluation Criteria: Applications will be evaluated under the general criteria outlined below. The Comptroller will make the final decision. The Comptroller reserves the right to accept or reject any or all applications submitted. The Comptroller is not obligated to execute a loan agreement on the basis of this NOLFA and RFA. The Comptroller shall not pay for any costs incurred by any entity in responding to this NOLFA or RFA. Comptroller and SECO may request additional information at any time if deemed necessary for further evaluation. General evaluation criteria are as follows and as set forth in the application instructions:

Criterion 1: Best Value Considerations, Including Projected Energy Savings, Number of Jobs Created, and other factors (45%)

* Applicants' Projects are Ready to Go;

* Payback period of project/quicker payback given more points;

* Projected energy savings attributed to eligible energy efficiency measures in order to achieve an annual 10 million BTUs saved for every $1,000 spent;

* More renewable technology incorporated above 5% will score higher

* Applicant provided reasonable and feasible projected green house gas emissions reductions;

* Projected number of jobs created and retained;

* Other funds leveraged;

* Geographic diversity; and

* Projected energy savings.

Criterion 2: Team Expertise and Prior Experience (30%)

* Ability to assemble a team necessary to successfully accomplish the objectives of the proposed Project;

* Qualifications, expertise, and experience of identified key personnel in areas relevant to the proposed work;

* Organizational and individual experience and degree of success achieved in conducting Projects of similar scope and nature;

* Appropriateness of the planned assignment of responsibilities and level of effort among individuals and corporate team member; and

* Adequacy of the Applicant and/or team resources to successfully complete the proposed work.

Criterion 3: Technical Approach and Work Plan/ Statement of Work (25%)

* Responsiveness and relevance of the application to the programmatic goals and requirements identified in this announcement for this area of interest;

* Likelihood of successfully completing the proposed Project based on the adequacy and thoroughness of the technical approach for the proposed work including

* Clarity, completeness, and adequacy of the detailed description of the work to be performed;

* Adequacy and appropriateness of the schedule including the duration and sequencing of tasks and the scheduling of Project milestones and decision points;

* Adequacy of the proposed data collection and reporting activities;

* Appropriateness of the planned level of manpower; and

* Adequacy of the discussion of safety and environmental compliance considerations (indicating an adequate understanding of required certifications, licenses, permits, NEPA implications, etc).

The anticipated schedule of events pertaining to this RFA is as follows: Issuance of RFA - October 30, 2009, after 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due - November 6, 2009, 2:00 p.m. CZT; Official Responses to Questions posted - November 13, 2009, or as soon thereafter as practical; Applications Due - December 30, 2009, 2:00 p.m. CZT; Loan Agreement Execution - February 1, 2010, or as soon thereafter as practical; Commencement of Project - February 1, 2010, or as soon thereafter as practical.

TRD-200904794
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: October 21, 2009

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.009, and 304.003, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/26/09 - 11/01/09 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/26/09 - 11/01/09 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 11/01/09 - 11/30/09 is 5.00% for Consumer/Agricultural/Commercial/credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 11/01/09 - 11/30/09 is 5.00% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200904780
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 20, 2009

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Credit Union Department

Application to Amend Articles of Incorporation

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application for a name change was received from EDS Credit Union, Plano, Texas. The credit union is proposing to change its name to InTouch Credit Union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200904789
Harold E. Feeney
Commissioner
Credit Union Department
Filed: October 21, 2009

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Applications to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department (Department) and are under consideration:

An application was received from North East Texas Credit Union, Lone Star, Texas to expand its field of membership. The proposal would permit members of Friends of Consumer Freedom, Inc. located at 3526 Lakeview Parkway, Rowlett, Texas 75088, to be eligible for membership in the credit union.

An application was received from Cabot & NOI Employees Credit Union, Pampa, Texas to expand its field of membership. The proposal would permit employees of Ford Family Chiropractic, 701 N. Price Rd., Pampa, Texas 79065, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200904790
Harold E. Feeney
Commissioner
Credit Union Department
Filed: October 21, 2009

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Applications to Expand Field of Membership--Approved

EDS Credit Union (#2), Plano, Texas--See *Texas Register* issue, dated July 31, 2009.

EDS Credit Union (#3), Plano, Texas--See *Texas Register* issue, dated July 31, 2009.

EDS Credit Union (#5), Plano, Texas--See *Texas Register* issue, dated July 31, 2009.

Application to Amend Articles of Incorporation--Approved

Associated Credit Union of Texas, Texas City, Texas--See *Texas Register* issue, dated August 28, 2009.

TRD-200904791
Harold E. Feeney
Commissioner
Credit Union Department
Filed: October 21, 2009

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Deep East Texas Council of Governments

Request for Proposals for Highway Information System

Deep East Texas Council of Governments (DETCOG) Highway Information System, Low Power AM Radio Highway Advisory Radio System Project

I. Overview

The Deep East Texas Council of Governments is now accepting bids to expand the low power AM Radio Highway Information System (HIS). The bids for the HIS System must be compatible with the existing Quixote Technologies Transmission equipment and be capable of having a maximum effective range of four to six miles

Bid documents may be picked up at the DETCOG office located at 210 Premier Drive; Jasper, Texas 75951 through Friday, November 6, 2009, at 5:00 p.m.

II. Obtaining Full RFP and Submission Information

The full RFP can be obtained at http:detcog.org or by contacting:

Sheryl Benoit, Purchasing Agent

Phone (409) 384-5704 ext. 230

Fax (409) 384-5390

E-mail: sbenoit@detcog.org

Submission is due to DETCOG no later than 3:00 p.m. on November 16, 2009.

TRD-200904775
Walter G. Diggles, Sr.
Executive Director
Deep East Texas Council of Governments
Filed: October 20, 2009

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Texas Education Agency

Request for Applications Concerning Rural Technology Grant Pilot Program, Cycle 3

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-10-101 from Texas independent school districts and open-enrollment charter schools that have an enrollment of less than 5,000 students and that are not located in an area defined by the U.S. Office of Management and Budget as a standard metropolitan statistical area as of January 1, 2007. A list of all Texas independent school districts and open-enrollment charter schools that meet these eligibility criteria will be posted online at http://www.tea.state.tx.us/technology/rtech/eligibilitylist.pdf. Applicants must have completed and submitted their most recent STaR Chart (2008-2009, or 2009-2010 if available). Eligible districts and charter schools may submit only one application. Shared services arrangements are not permitted. Additional eligibility criteria also apply, as defined in the RFA.

Grantees receiving funding under the Rural Technology Grant Pilot Program, Cycles 1 and/or 2, are eligible to apply for Cycle 3 funding, but the Cycle 3 program must be designed to serve a different grade level than those served in Cycle 1 or Cycle 2 and/or to provide technology-based instruction in a subject additional to those taught with Cycle 1 or Cycle 2 funds.

Description. The purpose of the Rural Technology Grant Pilot Program, Cycle 3, is to establish pilot programs to provide technology-based supplemental instruction, including online courses, to students in rural school districts (i.e., districts with an enrollment of less than 5,000 students and a location outside a standard metropolitan statistical area) to improve the overall success of students and address their individual academic needs. The Rural Technology Grant Pilot Program, Cycle 3, is designed to improve student performance for students not currently meeting academic standards in English language arts, social studies, mathematics, science, or languages other than English and to supplement the education of students needing more opportunities than currently provided by the district.

Dates of Project. The Rural Technology Grant Pilot Program, Cycle 3, will be implemented during the 2009-2010, 2010-2011, and 2011-2012 school years. Applicants should plan for a starting date of no earlier than February 1, 2010, and an ending date of no later than February 29, 2012.

Project Amount. Approximately $7.6 million is available for funding the Rural Technology Grant Pilot Program, Cycle 3, during the February 1, 2010, through February 29, 2012, project period. Pursuant to the authorizing legislation, the TEA will award the selected districts state grant funds in an amount not to exceed $200 per grant year for each student in an eligible grade level participating in the program. The maximum amount of state grant funds that may be requested for the entire grant period is $200,000. This project is funded 100 percent with state funds.

Applicants' Conference. An applicants' conference will be held on Friday, November 13, 2009, from 10:00 a.m. to 12:00 p.m. on the Texas Educational Telecommunication Network (TETN) available at each regional education service center (ESC) (TETN Event #5988). To locate the nearest TETN facility, applicants should contact the TETN site manager at their regional ESC. A complete list of ESCs, including contact information, is available on the TEA website at http://www.tea.state.tx.us/ESC/.

Questions relevant to the RFA may be emailed to Kelly Griffin at Kelly.Griffin@tea.state.tx.us or Richard LaGow at Richard.LaGow@tea.state.tx.us or faxed to (512) 463-9090 prior to Monday, November 9, 2009. These questions, along with other information, will be addressed in the presentation. The conference will be open to all potential applicants and will provide general and clarifying information about the program and RFA.

The entire applicants' conference will be digitally recorded. Prospective applicants who are not able to attend the applicants' conference may request a password and procedures to download the video stream from the TETN site manager at their local ESC.

Selection Criteria. Applications will be selected based on the independent reviewers' assessment of each applicant's ability to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. El-

igible applicants for the Rural Technology Grant Pilot Program, Cycle 3, will be rank ordered and scored, with 100 total points possible, in accordance with the criteria described in Part 2: Program Guidelines of the RFA. In addition, in accordance with the Texas Education Code, §29.919(c), the commissioner of education "shall give priority to a campus that offers a relatively limited course selection to students, in comparison to the course selections generally offered to students in metropolitan areas." TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA and that are most advantageous to the project.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. RFAs are no longer available in print. The announcement letter and complete RFA will be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms for viewing and downloading. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Further Information. For clarifying information about the RFA, contact Donnell Bilsky, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any and all questions must be submitted in writing to the TEA contact persons identified in Part 2: Program Guidelines of the RFA. All questions and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Tuesday, December 8, 2009, to be eligible to be considered for funding.

TRD-200904792
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: October 21, 2009

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 30, 2009**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 30, 2009**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: A. & P. Water Supply Corporation; DOCKET NUMBER: 2009-1208-PWS-E; IDENTIFIER: RN101216512; LOCATION: Panola County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 Texas Administrative Code (TAC) §290.41(c)(1)(F), by failing to obtain a sanitary control easement that covers the land within 150 feet of the well or to obtain executive director approval for a substitute to the sanitary control easement requirement; 30 TAC §290.41(c)(1)(D), by failing to restrict livestock from occupying land within 50 feet of the water supply well; 30 TAC §290.43(c)(8), by failing to maintain the facility's 4,000 gallon ground storage tank in strict accordance with American Water Works Association requirements; and 30 TAC §290.45(b)(1)(C)(iv) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to provide a pressure tank capacity of 20 gallons per connection; PENALTY: $413; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(2) COMPANY: ADDISON ENTERPRISES, INC. dba Phillips 66; DOCKET NUMBER: 2008-0676-PST-E; IDENTIFIER: RN100710573; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system (VRS) in proper operating condition; and 30 TAC §115.242(9) and THSC, §382.085(b), by failing to post operating instructions conspicuously on the front of each gasoline dispensing pump equipped with a Stage II VRS; PENALTY: $5,116; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: Beechwood Water Supply Corporation; DOCKET NUMBER: 2009-1279-PWS-E; IDENTIFIER: RN101199404; LOCATION: Sabine County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.45(f)(4) and (g), by failing to provide a purchase water contract that authorized a maximum daily purchase rate, or a uniform purchase rate to meet a minimum alternate production capacity of 0.33 gallons per minute per connection; 30 TAC §290.46(m)(4), by failing to maintain all treatment units, storage, and pressure maintenance facilities, distribution system lines, and related appurtenances in a watertight condition; 30 TAC §290.46(v), by failing to ensure that all water system electrical wiring is securely installed in compliance with a local or national electrical code; 30 TAC §290.43(c)(5), by failing to ensure the storage tank's inlet and outlet

connections are properly located so as to prevent short-circuiting or the stagnation of water; 30 TAC §290.46(i), by failing to adopt an adequate plumbing ordinance, regulations, or service agreement with provisions for proper enforcement to ensure that neither cross-connections nor other unacceptable plumbing practices are permitted; and 30 TAC §290.46(f)(2) and (3)(A)(iv), by failing to provide facility records to commission personnel at the time of the investigation; PENALTY: $1,429; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(4) COMPANY: BELTWAY 8 INVESTMENTS, LLC dba Courtesy Chevron; DOCKET NUMBER: 2009-1192-PST-E; IDENTIFIER: RN102801123; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2)(A) and the Code, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the underground storage tank (UST) system; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $12,192; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(5) COMPANY: Charles Mullins dba C & J Tree Service; DOCKET NUMBER: 2009-0652-MLM-E; IDENTIFIER: RN105425623; LOCATION: Terrell, Kaufman County; TYPE OF FACILITY: tree service; RULE VIOLATED: 30 TAC §111.201 and §330.15(c) and THSC, §382.085(b), by failing to prevent outdoor burning and dumping or disposal of municipal solid waste; PENALTY: $2,694; ENFORCEMENT COORDINATOR: Martina Kusniadi, (713) 767-3500; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: CMH Parks, Inc.; DOCKET NUMBER: 2009-1160-MWD-E; IDENTIFIER: RN102916574; LOCATION: Collin County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.43 and the Code, §26.121(a), by failing to obtain a permit for the operation of the facility; PENALTY: $9,990; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: DDMRK Management, Inc. dba Rumpy's Convenience Store; DOCKET NUMBER: 2009-1101-PST-E; IDENTIFIER: RN104499223; LOCATION: Gainesville, Cooke County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; and 30 TAC §334.42(i), by failing to inspect all sumps, manways, overspill containers or catchment basins associated with a UST system; PENALTY: $11,724; ENFORCEMENT COORDINATOR: Danielle Porras, (512) 239-2602; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Eagle Rock Field Services, L.P.; DOCKET NUMBER: 2009-1077-AIR-E; IDENTIFIER: RN100225002; LOCATION: Canadian, Hemphill County; TYPE OF FACILITY: natural gas compression station; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(B), General Operating Permit Number O-0154/Oil and Gas General Operating Permit Number 514, Site-Wide Requirements (b)(2), and THSC, §382.085(b), by failing to submit a timely semi-annual deviation report; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(9) COMPANY: Eagle Rock Field Services, L.P.; DOCKET NUMBER: 2009-1083-AIR-E; IDENTIFIER: RN100227792; LOCATION: Carson County; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(B), General Operating Permit Number O-00525, Site-Wide Requirements (b)(2), and THSC, §382.085(b), by failing to submit a timely semi-annual deviation report; and 30 TAC §122.143(4) and §122.145(2)(A), General Operating Permit Number O-00525, Site-Wide Requirements (b)(2), and THSC, §382.085(b), by failing to report all instances of deviations in the semi-annual deviation report; PENALTY: $2,054; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(10) COMPANY: Eagle Rock Field Services, L.P.; DOCKET NUMBER: 2009-1143-AIR-E; IDENTIFIER: RN102533981; LOCATION: White Deer, Carson County; TYPE OF FACILITY: natural gas compression plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(A) and (B), General Operating Permit Number 0-0522/Oil and Gas General Operating Permit Number 514, Site-Wide Requirements (b)(1) and (2), and THSC, §382.085(b), by failing to report a deviation and to submit a deviation report when a deviation occurred; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(11) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2008-1085-AIR-E; IDENTIFIER: RN100542281; LOCATION: Channelview, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), New Source Review (NSR) Permit Numbers 1768 and 2936, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $13,240; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: City of Follett; DOCKET NUMBER: 2009-0961-MWD-E; IDENTIFIER: RN101916559; LOCATION: Lipscomb County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.65 and §305.125(2), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010508001, Permit Condition Number 4.c., and the Code, §26.121, by failing to renew TPDES Permit Number WQ0010508001 before expiration and is continuing to operate; PENALTY: $4,160; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(13) COMPANY: Fort Bend County Municipal Utility District Number 58; DOCKET NUMBER: 2009-0976-MWD-E; IDENTIFIER: RN104305867; LOCATION: Fort Bend County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014520001, Interim I Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for ammonia-nitrogen (NH_3N) and total suspended solids (TSS); PENALTY: $2,400; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 425-6010; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(14) COMPANY: Leemond Gatson; DOCKET NUMBER: 2009-1596-WOC-E; IDENTIFIER: RN103439295; LOCATION: Newton County; TYPE OF FACILITY: water licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational

license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(15) COMPANY: Kaneka Texas Corporation; DOCKET NUMBER: 2009-0935-AIR-E; IDENTIFIER: RN100683291; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: plastic materials and resin manufacturing plant; RULE VIOLATED: 30 TAC §101.10(e) and THSC, §382.085(b), by failing to submit an emissions inventory questionnaire for the year 2008; PENALTY: $1,950; ENFORCEMENT COORDINATOR: Martina Kusniadi, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(16) COMPANY: Lewis King; DOCKET NUMBER: 2009-1643-WOC-E; IDENTIFIER: RN105784904; LOCATION: Vernon, Wilbarger County; TYPE OF FACILITY: water licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(17) COMPANY: MANITEX, INC.; DOCKET NUMBER: 2009-0807-MLM-E; IDENTIFIER: RN101641884; LOCATION: Georgetown, Williamson County; TYPE OF FACILITY: heavy duty equipment manufacturing; RULE VIOLATED: 30 TAC §324.6 and 40 Code of Federal Regulations (CFR) §279.22(c)(1), by failing to properly label or mark used oil containers with the words "Used Oil"; 30 TAC §335.6(c), by failing to immediately document any changes to the notice of registration or additional information with respect to that originally provided and provide notification within 90 days of the occurrence of such change or of becoming aware of such additional information; 30 TAC §335.62 and 40 CFR §262.11, by failing to conduct proper hazardous waste determinations on solid wastes; 30 TAC §335.262(1) and 40 CFR §273.15(c), by failing to demonstrate the length of time universal waste had been accumulated; 30 TAC §335.262(c)(2)(F), by failing to contain paint and paint related waste in a container that was labeled or marked clearly with the words "Universal Waste-Paint Related Wastes"; 30 TAC §335.262(c)(2)(A), by failing to contain paint or paint-related waste in closed containers; and 30 TAC §335.4(3) and §213.8(3), by failing to prevent the discharge of industrial waste that will endanger the public health and welfare; PENALTY: $11,222; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(18) COMPANY: Joseph M. Meyers; DOCKET NUMBER: 2009-1644-WOC-E; IDENTIFIER: RN103385639; LOCATION: Huntsville, San Jacinto County; TYPE OF FACILITY: water licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(19) COMPANY: City of Palestine; DOCKET NUMBER: 2009-0659-MWD-E; IDENTIFIER: RN102183233; LOCATION: Palestine, Anderson County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010244001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for NH_3N and TSS; and 30 TAC §305.125(1) and (5), TPDES Permit Number WQ0010244001, Operational Requirements Number 1 and Permit Conditions 2.g., and the Code, §26.121(a), by failing to ensure that the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained; PENALTY: $28,700; Supplemental Environmental Project (SEP) offset amount of $22,960 applied to Texas Association of Resource Conservation and Development Areas, Inc. (RC&D) - Household Hazardous Waste Clean-Up; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(20) COMPANY: Peaster Independent School District; DOCKET NUMBER: 2009-0227-MWD-E; IDENTIFIER: RN102078045; LOCATION: Parker County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013589001, Effluent Limitations and Monitoring Requirements Numbers 1 and 6, TCEQ Agreed Order Docket Number 2005-0797-MWD-E, Ordering Provision Number 3, and the Code, §26.121(a), by failing to comply with permit effluent limits; 30 TAC §305.125(1) and (5) and TPDES Permit Number WQ0013589001, Operational Requirements Number 4, by failing to provide adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failures; and 30 TAC §305.125(1) and TPDES Permit Number WQ0013589001, Monitoring and Reporting Requirements Number 7.c., by failing to submit the noncompliance notification when any effluent violation deviates by more than 40% of the permitted limit; PENALTY: $49,100; SEP offset amount of $49,100 applied to RC&D- Clean School Buses; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: Rocky Point Estate Land Trust; DOCKET NUMBER: 2009-0969-MWD-E; IDENTIFIER: RN101609972; LOCATION: Flower Mound, Denton County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013732001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations; 30 TAC §305.125(17) and §319.7(d) and TPDES Permit Number WQ0013732001, Monitoring and Reporting Requirements Number 1, by failing to timely submit the discharge monitoring reports (DMRs); and 30 TAC §305.125(17) and TPDES Permit Number WQ0013732001, Sludge Provisions, by failing to submit the annual sludge report; PENALTY: $17,756; ENFORCEMENT COORDINATOR: Carlie Konkol, (361) 825-3100; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: Sabine River Authority of Texas; DOCKET NUMBER: 2009-1304-MLM-E; IDENTIFIER: RN103154944; LOCATION: Sabine County; TYPE OF FACILITY: beneficial land use site; RULE VIOLATED: 30 TAC §312.44(h)(1) and §330.15(a), TCEQ Water Treatment Plant Sludge Registration Number 730046, Operational Requirements, and the Code, §26.121(a), by failing to prevent the unauthorized disposal and discharge of water treatment sludge; and 30 TAC §330.15(c) and the Code, §26.121(c), by failing to prevent the unauthorized disposal of solid waste; PENALTY: $1,900; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 293-4490; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(23) COMPANY: San Antonio Water System; DOCKET NUMBER: 2009-0897-MWD-E; IDENTIFIER: RN102187267; LOCATION: Bexar County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(5), TPDES Permit Number WQ0010137040, Interim I Effluent Limitations and Monitoring Requirements Number 4, Permit Conditions Number 2(d), and the Code, §26.121(a)(1), by failing to prevent the discharge of an excessive amount of solids from the facility; PENALTY: $46,000; SEP offset amount of $46,000 applied to Texas State University River Systems Institute - *Continuous Water Quality Monitoring Network*; EN-

FORCEMENT COORDINATOR: Pamela Campbell, (512) 293-4493; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(24) COMPANY: San Patricio County Municipal Utility District Number 1; DOCKET NUMBER: 2009-1135-MWD-E; IDENTIFIER: RN101418523; LOCATION: San Patricio County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(5), TPDES Permit Number WQ0013644001, Operational Requirements Number 4, by failing to maintain adequate safeguards to prevent the discharge of untreated or inadequately treated wastewater during electrical power failures; PENALTY: $2,875; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(25) COMPANY: Septic Hydro-Tec, Inc.; DOCKET NUMBER: 2009-1591-WR-E; IDENTIFIER: RN103151155; LOCATION: Goodrich, Polk County; TYPE OF FACILITY: plumbing; RULE VIOLATED: the Code, §11.081 and §11.121, by impounding, diverting, or using state water without a required permit; PENALTY: $350; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(26) COMPANY: City of Slaton; DOCKET NUMBER: 2009-0836-PWS-E; IDENTIFIER: RN101202604; LOCATION: Slaton, Lubbock County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.41(c)(1), by failing to ensure that ground water sources are located so that there will be no danger of pollution from flooding or from unsanitary surroundings; 30 TAC §290.42(l), by failing to compile and maintain a thorough plant operations manual for operator review and reference; 30 TAC §290.43(c)(2), by failing to ensure that the hatch on all the ground storage tanks remain locked except during inspection and maintenance activities; 30 TAC §290.43(c)(4), by failing to provide all water storage tanks with a liquid level indicator; 30 TAC §290.44(h)(1)(A), by failing to install a backflow prevention assembly or an air gap at all residences and establishments where an actual or potential contamination hazard exists; 30 TAC §290.46(u), by failing to plug an abandoned PWS with cement according to 16 TAC Chapter 76 (relating to Water Well Drillers and Water Well Pump Installers) or test the well every five years; and 30 TAC §290.121(a), by failing to develop and maintain an up-to-date chemical and microbiological monitoring plan; PENALTY: $17,468; ENFORCEMENT COORDINATOR: Chris Keffer, (512) 239-5610; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(27) COMPANY: Texas Airstream Harbor, Inc.; DOCKET NUMBER: 2009-1041-MWD-E; IDENTIFIER: RN103014445; LOCATION: Zavalla, Angelina County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0011895001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for biochemical oxygen demand and TSS; and 30 TAC §305.125(17) and TPDES Permit Number WQ0011895001, Monitoring and Reporting Requirements Number 1, by failing to submit the DMR data for TSS; PENALTY: $1,125; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(28) COMPANY: Texas Petrochemicals, LLC; DOCKET NUMBER: 2009-0634-AIR-E; IDENTIFIER: RN100219526; LOCATION: Houston, Harris County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 46307, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to properly report Incident Number 118159 within 24 hours of discovery; 30 TAC §101.201(c) and THSC, §382.085(b), by failing to submit a final report of a reportable emissions event within 14 days; 30 TAC §101.201(b)(1)(l) and THSC, §382.085(b), by failing to comply with emissions event reporting requirements; and 30 TAC §§101.20(1), 111.111(a)(1)(A), and 116.115(c), 40 CFR §60.18(c)(1), Air Permit Number 46307, SC Number 9C, and THSC, §382.085(b), by failing to prevent visible emissions; PENALTY: $63,140; SEP offset amount of $31,570 applied to Houston Regional Monitoring Corporation - Houston Area Monitoring; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 898-3838; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(29) COMPANY: The Lubrizol Corporation; DOCKET NUMBER: 2009-0711-AIR-E; IDENTIFIER: RN101058410; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: industrial organic chemicals plant; RULE VIOLATED: 30 TAC §§122.143(4) and (15), 122.145(2)(C), and 122.165(a)(7), Federal Operating Permit Number O-01582, General Terms and Conditions, and THSC, §382.085(b), by failing to submit a timely and properly certified semi-annual deviation report; and 30 TAC §116.115(c), 40 CFR §§60.18(3)(ii), 63.11(b)(6)(ii), and 63.2450(3)(2), NSR Permit Number 7264, SC Number 15A, and THSC, §382.085(b), by failing to comply with the net heating value requirements for flares; PENALTY: $8,147; ENFORCEMENT COORDINATOR: Martina Kusniadi, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(30) COMPANY: TWISTER INVESTMENT, INC. dba 149 Exxon; DOCKET NUMBER: 2009-1211-PST-E; IDENTIFIER: RN104089305; LOCATION: Magnolia, Montgomery County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; 30 TAC §115.244(3) and THSC, §382.085(b), by failing to conduct monthly inspections of the Stage II VRS; 30 TAC §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II VRS in proper operating condition; and 30 TAC §115.242(9) and THSC, §382.085(b), by failing to post operating instructions conspicuously on the front of each gasoline dispensing pump equipped with a Stage II VRS; PENALTY: $7,980; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-200904786
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 20, 2009

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Enforcement Orders

A default order was entered regarding Eulalio Trevino, Docket No. 2006-1845-PST-E on October 8, 2009 assessing $5,775 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dinniah Tadema, Staff Attorney at (512) 239-0617, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Interglobe Trade Channel, Inc., aka F & H Station, Inc. dba Dossani Food Mart, Docket No. 2007-1600-PST-E on October 8, 2009 assessing $27,430 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jennifer Cook, Staff Attorney at (512) 239-1873, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pasadena Refining System, Inc., Docket No. 2008-0050-AIR-E on October 8, 2009 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 767-3553, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Elvi Lorena Hilton dba Mockingbird Cleaners, Docket No. 2008-0198-DCL-E on October 8, 2009 assessing $1,825 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gary Shiu, Staff Attorney at (713) 422-8916, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Barbara Miller dba Turner Water Service, Docket No. 2008-0268-PWS-E on October 8, 2009 assessing $11,714 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding US Ecology Texas, Inc., Docket No. 2008-0355-MLM-E on October 8, 2009 assessing $92,650 in administrative penalties with $18,530 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Truestates, LLC dba Braker Mart, Docket No. 2008-0702-MLM-E on October 8, 2009 assessing $8,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Phillip Goodwin, Staff Attorney at (512) 239-0675, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Big City Crushed Concrete, L.P., Docket No. 2008-0877-AIR-E on October 8, 2009 assessing $5,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Treadwell, Staff Attorney at (512) 239-0974, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Load Trail, Ltd., Docket No. 2008-1220-IHW-E on October 8, 2009 assessing $44,630 in administrative penalties with $8,926 deferred.

Information concerning any aspect of this order may be obtained by contacting Mike Meyer, Enforcement Coordinator at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Defense Energy Support Center and the United States Department of the Army, Docket No. 2008-1265-WQ-E on October 8, 2009 assessing $2,444 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Gilbert Garcia dba ABC Sandblasting, Docket No. 2008-1380-MLM-E on October 8, 2009 assessing $9,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hermenegildo Bueno dba Paisano Truck Stop, Docket No. 2008-1467-AIR-E on October 8, 2009 assessing $1,260 in administrative penalties with $252 deferred.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KAVMEL INC. dba Shop Smart 2, Docket No. 2008-1471-PST-E on October 8, 2009 assessing $4,375 in administrative penalties with $875 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rolando Lopez, Docket No. 2008-1562-WOC-E on October 8, 2009 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Keith Frank, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Exxon Mobil Corporation, Docket No. 2008-1727-AIR-E on October 8, 2009 assessing $30,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Stanley McMahan, Docket No. 2008-1905-MSW-E on October 8, 2009 assessing $2,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin Thompson, Staff Attorney at (512) 239-1297, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding New Way Enterprise Inc. dba Time Out Food Mart 2, Docket No. 2008-1935-PST-E on October 8, 2009 assessing $11,276 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari Gilbreth, Staff Attorney at (512) 239-1320, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Industrial Scrap Materials, Inc., Docket No. 2009-0008-MSW-E on October 8, 2009 assessing $2,040 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mike Fishburn, Staff Attorney at (512) 239-0635, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Transcontinental Realty Investors, Inc., Docket No. 2009-0016-MSW-E on October 8, 2009 assessing $35,700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin Thompson, Staff Attorney at (512) 239-1297, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sally F. Powell Company, Inc. dba Chad Powell Homes, Docket No. 2009-0021-WQ-E on October 8, 2009 assessing $1,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mike Fishburn, Staff Attorney at (512) 239-0635, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RSE, Inc. dba Handy Stop, Docket No. 2009-0053-PST-E on October 8, 2009 assessing $2,945 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Phillip Goodwin, Staff Attorney at (512) 239-0675, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Mohammad Rafiul Habib, Docket No. 2009-0072-PST-E on October 8, 2009 assessing $6,420 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari Gilbreth, Staff Attorney at (512) 239-1320, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hector Rangel, Jr. and Luz Maria Rangel, Docket No. 2009-0087-MSW-E on October 8, 2009 assessing $3,300 in administrative penalties with $660 deferred.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding McMullen County Water Control and Improvement District 2, Docket No. 2009-0125-PWS-E on October 8, 2009 assessing $1,011 in administrative penalties with $202 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator at (512) 239-1482, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ExxonMobil Oil Corporation, Docket No. 2009-0153-AIR-E on October 8, 2009 assessing $38,494 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Treadwell, Staff Attorney at (512) 239-0974, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KMCO, L.P., Docket No. 2009-0299-AIR-E on October 8, 2009 assessing $21,128 in administrative penalties with $4,225 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Invista S.a.r.l., Docket No. 2009-0364-AIR-E on October 8, 2009 assessing $5,356 in administrative penalties with $1,071 deferred.

Information concerning any aspect of this order may be obtained by contacting Kirk Schoppe, Enforcement Coordinator at (512) 239-0489, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding 850 Pine Street Inc., Docket No. 2009-0374-AIR-E on October 8, 2009 assessing $9,575 in administrative penalties with $1,915 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Benoit, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Targa Midstream Services Limited Partnership, Docket No. 2009-0377-AIR-E on October 8, 2009 assessing $65,450 in administrative penalties with $13,090 deferred.

Information concerning any aspect of this order may be obtained by contacting James Nolan, Enforcement Coordinator at (512) 239-6634, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MAREDIA, INC. dba Convenient Food Mart 4, Docket No. 2009-0420-PST-E on October 8, 2009 assessing $19,701 in administrative penalties with $3,940 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Albemarle Corporation, Docket No. 2009-0427-AIR-E on October 8, 2009 assessing $20,989 in administrative penalties with $4,197 deferred.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 767-3553, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CHITTAGONG CORPORATION dba ANB Food Mart, Docket No. 2009-0437-PST-E on October 8, 2009 assessing $9,532 in administrative penalties with $1,906 deferred.

Information concerning any aspect of this order may be obtained by contacting Brianna Carlson, Enforcement Coordinator at (956) 430-6021, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding John Rahimi and Ramin Ahmad dba Watauga Quick Stop, Docket No. 2009-0453-PST-E on October 8, 2009 assessing $15,658 in administrative penalties with $3,131 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825,

Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Stoneridge Custom Homes, Inc., Docket No. 2009-0473-WQ-E on October 8, 2009 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Barham Richard, Staff Attorney at (512) 239-0107, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Emory, Docket No. 2009-0485-PWS-E on October 8, 2009 assessing $19,430 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villareal, Enforcement Coordinator at (361) 825-3425, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Intercontinental Terminals Company LLC, Docket No. 2009-0500-AIR-E on October 8, 2009 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 767-3553, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lucite International, Inc., Docket No. 2009-0522-AIR-E on October 8, 2009 assessing $70,546 in administrative penalties with $14,109 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Petrochemicals LLC, Docket No. 2009-0524-AIR-E on October 8, 2009 assessing $10,200 in administrative penalties with $2,040 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Webster, Docket No. 2009-0536-MWD-E on October 8, 2009 assessing $8,250 in administrative penalties with $1,650 deferred.

Information concerning any aspect of this order may be obtained by contacting Jeremy Escobar, Enforcement Coordinator at (512) 239-1460, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Patton & Dial Quality Oil Company, LLC dba Grapeland Fuel, Docket No. 2009-0540-PST-E on October 8, 2009 assessing $14,400 in administrative penalties with $2,880 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Doug Dennis, Docket No. 2009-0555-OSI-E on October 8, 2009 assessing $1,011 in administrative penalties with $202 deferred.

Information concerning any aspect of this order may be obtained by contacting Keith Frank, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bob King's Truck Beds, LLC dba Kings Truck Beds, Docket No. 2009-0562-AIR-E on October 8, 2009 assessing $2,880 in administrative penalties with $576 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shelbyville Independent School District, Docket No. 2009-0563-MWD-E on October 8, 2009 assessing $15,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Steve Villatoro, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ZEBA, INC. dba Snappy Foods 3, Docket No. 2009-0586-PST-E on October 8, 2009 assessing $2,625 in administrative penalties with $525 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Yoonason, LLC dba Econo Lube N Tune 239, Docket No. 2009-0610-PST-E on October 8, 2009 assessing $7,747 in administrative penalties with $1,549 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Pace, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Robert Lee, Docket No. 2009-0625-MLM-E on October 8, 2009 assessing $11,174 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jennifer Graves, Enforcement Coordinator at (956) 430-6023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Deanville Water Supply Corporation, Docket No. 2009-0631-PWS-E on October 8, 2009 assessing $3,145 in administrative penalties with $629 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator at (512) 239-1482, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding C & R DISTRIBUTING, INC. dba Franklin Chevron, Docket No. 2009-0653-PST-E on October 8, 2009 assessing $4,447 in administrative penalties with $889 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Leonard, Docket No. 2009-0661-MWD-E on October 8, 2009 assessing $8,010 in administrative penalties with $1,602 deferred.

Information concerning any aspect of this order may be obtained by contacting Jennifer Graves, Enforcement Coordinator at (956) 430-6023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dirk Vereecken dba Vereecken Dairy, Docket No. 2009-0664-AGR-E on October 8, 2009 assessing $6,600 in administrative penalties with $1,320 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Waller, Docket No. 2009-0704-MWD-E on October 8, 2009 assessing $1,690 in administrative penalties with $338 deferred.

Information concerning any aspect of this order may be obtained by contacting Jeremy Escobar, Enforcement Coordinator at (512) 239-1460, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Balbir Singh, Docket No. 2009-0708-LII-E on October 8, 2009 assessing $1,050 in administrative penalties with $210 deferred.

Information concerning any aspect of this order may be obtained by contacting Keith Frank, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Milwhite, Inc., Docket No. 2009-0722-AIR-E on October 8, 2009 assessing $6,000 in administrative penalties with $1,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Round Rock Independent School District, Docket No. 2009-0726-EAQ-E on October 8, 2009 assessing $7,000 in administrative penalties with $1,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Jennifer Graves, Enforcement Coordinator at (956) 430-6023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NIPCO, Inc., Docket No. 2009-0771-AIR-E on October 8, 2009 assessing $2,900 in administrative penalties with $580 deferred.

Information concerning any aspect of this order may be obtained by contacting James Nolan, Enforcement Coordinator at (512) 239-6634, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Eagle Rock Desoto Pipeline, L.P., Docket No. 2009-0790-AIR-E on October 8, 2009 assessing $1,975 in administrative penalties with $395 deferred.

Information concerning any aspect of this order may be obtained by contacting Raymond Marlow, Enforcement Coordinator at (409) 899-8785, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NuStar Logistics, L.P., Docket No. 2009-0791-AIR-E on October 8, 2009 assessing $12,500 in administrative penalties with $2,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Miller Grove Water Supply Corporation, Docket No. 2009-0808-PWS-E on October 8, 2009 assessing $367 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Steve Villatoro, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Willow Park, Docket No. 2009-0864-MWD-E on October 8, 2009 assessing $8,610 in administrative penalties with $1,722 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GUERRA & REYNA INVESTMENTS, LP, Docket No. 2009-0872-EAQ-E on October 8, 2009 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Accent Collision Center, Inc., Docket No. 2009-0879-AIR-E on October 8, 2009 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 767-3553, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Daniel Blue, Docket No. 2009-0895-EAQ-E on October 8, 2009 assessing $1,400 in administrative penalties with $280 deferred.

Information concerning any aspect of this order may be obtained by contacting Jennifer Graves, Enforcement Coordinator at (956) 430-6023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CUSA KBC, LLC dba Cusa, Docket No. 2009-0936-PST-E on October 8, 2009 assessing $6,096 in administrative penalties with $1,219 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Etoile Water Supply Corporation, Docket No. 2009-0954-PWS-E on October 8, 2009 assessing $850 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pine Cove, Inc., Docket No. 2009-0962-MWD-E on October 8, 2009 assessing $1,900 in administrative penalties with $380 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Cory L. Bryant, Docket No. 2009-0960-OSI-E on October 8, 2009 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Michael W. Cruce, Docket No. 2009-1035-WOC-E on October 8, 2009 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Richard C. King, Docket No. 2009-1036-WR-E on October 8, 2009 assessing $350 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Joe Kahla, Docket No. 2009-1110-OSI-E on October 8, 2009 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding City of Marlin, Docket No. 2009-1170-WQ-E on October 8, 2009 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Hudspeth County, Docket No. 2009-1218-WQ-E on October 8, 2009 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding City of Brownwood, Docket No. 2009-1269-WQ-E on October 8, 2009 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Paul Vinson, Docket No. 2007-1566-LII-E on October 8, 2009 assessing $200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200904796
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 21, 2009

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Notice of Water Quality Applications

The following notices were issued on September 17, 2009 through October 16, 2009.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

GENTEX POWER CORPORATION which operates the Lost Pines 1 Power Plant, a combined cycle electric generating facility, has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004155000, which authorizes the discharge of low volume wastewater and storm water runoff on a flow variable basis via Outfall 101, domestic wastewater on a flow variable basis via Outfall 201, and low volume wastewater on a flow variable basis via Outfall 301. Once-through cooling water from this facility is discharged via Outfall 001 of the Lower Colorado River Authority's Sim Gideon facility regulated by TPDES Permit WQ0002052000. The facility is located adjacent to Lake Bastrop, approximately five miles northeast of the City of Bastrop on State Highway 21 in Bastrop County, Texas.

GUADALUPE BLANCO RIVER AUTHORITY has applied for a renewal of TPDES Permit No. WQ0011078001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 9,600,000 gallons per day. The facility is located on the east bank of the Guadalupe River, immediately north of U.S. Highway 59 in Victoria County, Texas 77905.

MEMORIAL POINT UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011147001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located approximately two miles south of the intersection of Farm-to-Market Roads 2457 and 3277 on the east side of Lake Livingston in Polk County, Texas 77351.

TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO 10 has applied for a renewal of Texas Commission on Environmental Quality (TCEQ) Permit No. WQ0014335001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 86,400 gallons per day via non-public access subsurface drip irrigation system with a minimum area of 873,200 square feet. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located at 620 Lohman's Ford Road, approximately 1,100 feet north-northwest of the intersection of Lohman's Ford Road and Ivean Pearson Road, about 4.5 miles south of Lago Vista in Travis County, Texas 78645.

CITY OF RICHMOND has applied for a minor amendment to the TPDES Permit No. WQ0010258004 to change the discharge of treated

domestic wastewater from annual average flow of 1,500,000 gallons to at a daily average flow not to exceed 950,000 gallons per day in the interim phase. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,000,000 gallons per day. The facility will be located approximately 8,715 feet east of the intersection of U.S. Highway 59 and Farm-to-Market Road 762 in Fort Bend County, Texas 77469.

DANIEL PATRICK SCHENK has applied for a Major Amendment of TPDES Permit No. WQ0004047000, for a Concentrated Animal Feeding Operation, to authorize the applicant to modify an existing Dairy facility by decreasing from 1,500 head to a maximum capacity of 990 head, all of which are milking cows and increasing the land application acreage from 184 acres to 480 acres. The facility is located on the west side of Schenk Lane, approximately 0.75 mile north of the intersection of Schenk Lane and Farm-to-Market Road 172 in Archer County, Texas.

HOUSTON REFINING LP, which operates Houston Refining Plant, has applied for a major amendment TPDES Permit No. WQ0000392000 to authorize an increase of the effluent limitations for total suspended solids at Outfalls 001, 002 and 003; the reduction in monitoring frequency at Outfalls 001, 002 and 003; the addition of a new provision to address sampling during adverse weather conditions; and the addition of utility wastewater to the wastestream at Outfalls 001, 002 and 003. The current permit authorizes the discharge of overflow of equalized contaminated storm water, storm water, and process wastewater on an intermittent and flow variable basis via Outfalls 001 and 003; and emergency sump overflow of partially treated process wastewater, contaminated storm water, and storm water being routed to Gulf Waste Disposal Authority on an intermittent and flow variable basis via Outfall 002. The facility is located at 12000 Lawndale Avenue in the City of Houston, Harris County, Texas 77017. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

VALERO REFINING TEXAS LP which operates the Valero Refining Company East Plant, an integrated petroleum refinery producing a full spectrum of petroleum products from crude oil has applied for a major amendment to TCEQ Permit No. WQ0000465000 to relocate Outfall 001 directly to the Corpus Christi Inner Harbor and apply appropriate effluent limits and testing requirements using an 8% critical dilution at relocated Outfall 001; increase technology-based effluent limitations based on process changes; add a new internal Outfall 101 for determination of compliance of technology-based effluent limitations after final treatment; apply water quality-based effluent limitations with a compliance period at current Outfall 001; allow for the re-use of treated wastewater after internal Outfall 101 and add new internal Outfall 201 to monitor the re-use flow volume; add reverse osmosis/demineralizer regeneration wastewater, recovered groundwater, Belco Scrubber wastewater, and miscellaneous wastewaters via Outfall 001; reduce the monitoring frequency for cyanide (amenable to chlorination) from once per week to once per quarter at Outfall 001; remove the daily average temperature effluent limit at Outfall 001; add the authorization to discharge steam condensate, compressor condensate, external steam line condensate, uncontaminated utility wastewaters, fire water flush waters, and uncontaminated hydrostatic test waters via Outfalls 002, 003 and 004; reduce the monitoring frequency for all parameters from once per day when discharging to once per week when discharging at Outfalls 002, 003 and 004; add a daily average dry weather flow limit not to exceed 325,000 gallons per day via Outfall 004; and add the authorization to discharge steam condensate, compressor condensate, external steam line condensate, uncontaminated utility wastewaters, fire water flush waters, uncontaminated hydrostatic test waters, and uncontaminated storm water on an intermittent and flow variable basis via new Outfall 005. The current permit authorizes the discharge of treated process, treated storm water, treated utility and treated ballast wastewaters at a daily average flow not to exceed 3,000,000 gallons per day; and the discharge of uncontaminated storm water on an intermittent and flow variable basis via Outfalls 002, 003 and 004. Issuance of this TPDES permit will replace the existing National Pollutant Discharge Elimination System Permit No. TX0006904 issued on September 22, 1995 and TCEQ Permit No. WQ0000465000 issued on March 23, 1993. The facility is located at 1300 Cantwell Lane, east of Navigation Boulevard, and approximately 0.5 mile north of Interstate Highway 37, northwest of the City of Corpus Christi, Nueces County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

TEXAS PETROCHEMICALS LLC West Baker Road, Baytown, Texas, 77520, which operates Texas Petrochemicals Baytown Plant, a bulk storage terminal which stores and distributes organic chemicals and organic chemical manufacturing facility, has applied for a major amendment to TPDES Permit No. WQ0002485000 to authorize the removal of existing internal Outfalls 101, 201, 301, and 401; a reduction in monitoring frequencies for total organic carbon and oil and grease at Outfall 001 from daily to once a week. The existing permit authorizes the discharge of storm water commingled with previously monitored effluents (storm water and fire system water via Outfall 101; treated process wastewater, utility wastewater, and storm water via Outfall 201; utility wastewater via Outfall 301; and storm water via Outfall 401) on an intermittent and flow variable basis via Outfall 001. The proposed permit authorizes the discharge of storm water, fire system water and utility wastewater commingled with previously monitored effluent (treated process wastewater, utility wastewater, and storm water via Outfall 201) on an intermittent and flow variable basis via Outfall 001. The facility is located at 4604 West Baker Road, approximately 1,600 feet west of Decker Drive (Spur 220), in the City of Baytown, Harris County, Texas 77520. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

BAYSHORE INDUSTRIAL LP which operates the Bayshore Industrial, L.P. Plant, Bayshore Industrial, L.P., 1300 McCabe Road, La Porte, Texas 77571, which operates the Bayshore Industrial, L.P. Plant, has applied to the TCEQ for a major amendment to TPDES Permit No. WQ0003608000 to authorize the removal of domestic wastewater including the associated effluent limitations at Outfall 001; to authorize an increase from a daily maximum flow not to exceed 75,000 gallons per day to a daily maximum flow not to exceed 150,000 gallons per day via Outfall 001; and to authorize the removal of Outfall 002. The current permit authorizes the discharge of treated cooling tower blowdown, railcar washwater, facility and equipment washwater, boiler blowdown, contact cooling water, cleaning water, storm water, and treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day via Outfall 001 and storm water on an intermittent and flow variable basis via Outfall 002. The facility is located approximately 850 feet west of the intersection of McCabe Road and State Highway 146, three miles south of the City of La Porte, Harris County, Texas.

CITY OF CORPUS CHRISTI, Del Mar College District, Port of Corpus Christi Authority, Texas Department of Transportation, and Texas

A&M University - Corpus Christi, which operate the City of Corpus Christi Municipal Separate Storm Sewer System, have applied to the TCEQ for a minor amendment of TPDES Permit No. WQ0004200000 which authorizes storm water point source discharges to surface water in the state from the City of Corpus Christi Municipal Separate Storm Sewer System (MS4). The MS4 is located in the City of Corpus Christi, in Nueces, Kleberg, San Patricio, and Aransas Counties, Texas.

REFUGIO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 1 has applied for a renewal of TPDES Permit No. WQ0010256001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000 gallons per day. The facility is located on Keller Road 0.1 mile south of the intersection of Keller Road and State Highway 239, and located approximately 0.1 mile west of the intersection of State Highway 239 and State Highway 35 in Refugio County, Texas 77990.

THE CITY OF MENARD has applied for a renewal of TPDES Permit No. WQ0010345001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 220,000 gallons per day. The facility is located on the south bank of the San Saba River, adjacent to Farm-to-Market Road 2092 and approximately 0.5 mile east of the intersection of Farm-to-Market Road 2092 and U.S. Highway 83 in Menard County, Texas 76859.

CITY OF CRANDALL has applied for a renewal of TPDES Permit No. WQ0010834001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day. The facility is located approximately 2,000 feet southwest of the intersection of Buffalo Creek and Farm-to-Market Road 148 in Kaufman County, Texas 75114.

CITY OF AUSTWELL has applied for a renewal of TPDES Permit No. WQ0011117001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 60,000 gallons per day. The facility is located southwest of the intersection of Stevens and Main Street in the City of Austwell in Refugio County, Texas 77950. The treated effluent is discharged directly to San Antonio Bay/Hynes Bay/Guadalupe Bay in Segment No. 2462 of the Bays and Estuaries.

BEVIL OAKS MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011551001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located approximately 6.5 miles northwest of the intersection of State Highway 105 and U.S. Highway 287, at a point 2.3 miles north of State Highway 105, in the northeast corner of the town of Bevil Oaks, approximately 700 feet south of Pine Island Bayou in Jefferson County, Texas 77713.

MILLSAP INDEPENDENT SCHOOL DISTRICT has applied to the TCEQ for a new permit, Proposed TCEQ Permit No. WQ0013537002, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day via a public access subsurface drip irrigation system with a minimum area of 100,188 square feet. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site will be located 870 feet west and 475 feet south of the intersection of Farm-to-Market Road 113 and Wilson Bend Road in Parker County, Texas.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO 142 has applied for a renewal of TPDES Permit No. WQ0014408001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed a combined flow of 1,200,000 gallons per day at Outfalls 001 and 002. The facility is located on Fulshear Gaston Road, approximately 1.15 miles southwest of the intersection of Farm-to-Market Road 1093 and Farm-to-Market Road 723 in Fort Bend County, Texas 77469.

CIRCLE T PROMOTIONS LTD has applied for a renewal of TPDES Permit No. WQ0014678001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 18,000 gallons per day. The facility is located at 4007 West Highway 36, 4.2 miles northwest of the City of Hamilton, on the southwest side of State Highway 36 in Hamilton County, Texas 76531.

G AND T PROPERTIES LLC has applied for a new permit, proposed TPDES Permit No. WQ0014809001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 25,000 gallons per day. The facility will be located approximately 800 feet southeast of North Dowling Road and approximately 600 feet southwest of Walnut Road off of Reveille Road in Brazos County, Texas 77845.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, toll-free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us.

Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200904795
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 21, 2009

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Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission announces its intent to submit amendments to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendments are effective November 1, 2009.

The amendments will modify the reimbursement methodologies in the Texas Medicaid State Plan as a result of Medicaid rate changes for the following services:

Primary Home Care, and Day Activity and Health Services.

The proposed amendments are estimated to result in an additional annual aggregate expenditure of $6,485,940 for federal fiscal year (FFY) 2010, with approximately $4,530,430 in federal funds and $1,955,511 in State General Revenue (GR). For FFY 2011, the estimated additional aggregate expenditure is $8,436,086, with approximately $5,161,197 in federal funds and $3,274,889 in GR.

Interested parties may obtain copies of the proposed amendment by contacting Pam McDonald, Director of Rate Analysis for Long Term Care, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1373; by facsimile at (512) 491-1998; or by e-mail at pam.mcdonald@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200904685
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 19, 2009

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Fort Worth	Georgina K. Sehapayak, M.D.	L06265	Fort Worth	00	10/01/09
Groves	LTHM Groves Operations L.L.C. dba Renaissance Hospital Groves	L06270	Groves	00	10/09/09
Port Arthur	ARPA Advanced Radiation Physics Associates L.P. dba Cancer Center of Southeast Texas	L06275	Port Arthur	00	10/13/09
The Woodlands	St. Luke's Lakeside Hospital L.L.C.	L06279	The Woodlands	00	10/02/09

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Angleton	Isotherapeutics Group L.L.C.	L05969	Angleton	12	10/07/09
Arlington	Arlington Memorial Hospital dba Texas Health Arlington Memorial Hospital	L02217	Arlington	94	10/05/09
Austin	Austin Heart P.A.	L04623	Austin	64	10/05/09
Austin	Heart Hospital IV. L.P. dba Heart Hospital of Austin	L05215	Austin	32	10/12/09
Austin	Seton Healthcare dba Seton Medical Center - Hays	L06254	Austin	03	10/12/09
Austin	Columbia St. David's Healthcare System L.P. dba South Austin Hospital	L03273	Austin	88	10/14/09
Austin	Bioo Scientific Corporation	L06248	Austin	01	10/13/09
Bishop	Ticona Polymers Inc.	L02441	Bishop	45	10/07/09
Brownsville	Columbia Valley Healthcare System L.P. dba Valley Regional Medical Center	L02274	Brownsville	40	10/09/09
Carrollton	Frisco Heart and Vascular Institute	L06118	Carrollton	01	10/16/09
College Station	Texas A&M University	L05683	College Station	12	10/05/09
College Station	TDI Brooks International Inc.	L06139	College Station	02	10/01/09
Comanche	Comanche County Consolidated Hospital District dba Comanche County Medical Center	L06200	Comanche	02	10/05/09
Corpus Christi	Spohn Hospital	L02495	Corpus Christi	101	10/08/09
Cuero	Cuero Community Hospital	L02448	Cuero	26	10/13/09
Dallas	Methodist Hospitals of Dallas Radiology Svcs.	L00659	Dallas	70	10/02/09
Dallas	Petnet Solutions Inc.	L05193	Dallas	37	10/13/09
Fort Worth	Radiology Associates	L03953	Fort Worth	51	10/09/09
Harlingen	South Texas Imaging Center-K.P.A.	L05636	Harlingen	09	10/14/09
Houston	The Methodist Hospital	L00457	Houston	170	10/01/09
Houston	Baylor College of Medicine	L00680	Houston	100	10/01/09
Houston	Doctors Hospital 1997 L.P. dba Doctors Hospital Parkway/Tidwell	L01964	Houston	52	10/05/09
Houston	Methodist Health Centers dba Methodist Willowbrook Hospital	L05472	Houston	30	10/05/09
Houston	American Diagnostic Tech L.L.C.	L05514	Houston	55	10/01/09
Houston	NIS Holdings Inc. dba Nuclear Imaging Services	L05775	Houston	56	10/06/09
Houston	University General Hospital L.P.	L06018	Houston	02	10/06/09

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Houston	NIS Holdings Inc. dba Nuclear Imaging Services	L05775	Houston	57	10/08/09
Houston	Memorial Hermann Hospital System dba Memorial Hospital - Memorial City	L01168	Houston	110	10/13/09
Houston	CHCA West Houston L.P. dba West Houston Medical Center	L05808	Houston	12	10/14/09
Irving	Healthcare Associates of Irving L.P.	L05371	Irving	08	10/08/09
Lamesa	Dawson County Hospital District dba Medical Arts Hospital	L06244	Lamesa	04	10/02/09
Lubbock	Covenant Medical Center	L00483	Lubbock	142	10/06/09
Lubbock	University Medical Center	L04719	Lubbock	112	10/01/09
Lubbock	Covenant Health System dba Joe Arrington Cancer Research and Treatment Center	L06028	Lubbock	11	09/30/09
Lubbock	Lubbock Heritage Hospital L.L.C. dba Grace Medical Center	L06040	Lubbock	06	10/09/09
Mesquite	Baylor Medical Center of Garland dba Baylor Diagnostic Imaging Center - Mesquite	L04914	Mesquite	23	10/06/09
Midlothian	TXI Operations L. P.	L01421	Midlothian	48	10/13/09
Mount Pleasant	Titus County Memorial Hospital	L02921	Mount Pleasant	30	10/01/09
Mount Pleasant	Titus County Memorial Hospital	L02921	Mount Pleasant	31	10/08/09
Plano	Comprehensive Breast Care Center of Texas Inc. dba Solis Women's Health	L05601	Plano	11	10/01/09
Richmond	Oakbend Medical Center	L02406	Richmond	53	10/01/09
San Antonio	The University of Texas Health Science Center at San Antonio	L01279	San Antonio	121	10/02/09
San Antonio	Texas Cancer Clinic	L05786	San Antonio	15	10/01/09
San Antonio	San Antonio Endovascular and Heart Institute	L05766	San Antonio	06	10/09/09
San Antonio	Christus Santa Rosa Healthcare	L02237	San Antonio	111	10/13/09
San Antonio	VHS San Antonio Partners L.L.C. dba Baptist Health System	L00455	San Antonio	192	10/14/09
San Antonio	Petnet Solutions Inc.	L05569	San Antonio	22	10/13/09
Sugarland	Fort Bend Heart Center	L05678	Sugarland	09	10/07/09
Sugarland	Southwest Cardiology Associates	L05749	Sugarland	05	10/05/09
Texarkana	Alumax Mill Products Inc.	L04663	Texarkana	15	10/12/09
The Woodlands	Memorial Hermann Hospital System dba Memorial Hermann Hospital - The Woodlands	L03772	The Woodlands	74	10/01/09
The Woodlands	St. Luke's The Woodlands Hospital	L05763	The Woodlands	20	10/13/09
Throughout TX	Desert Industrial X-Ray L.P.	L04590	Abilene	101	10/13/09
Throughout TX	Weld Spec Inc.	L05426	Beaumont	88	10/13/09
Throughout TX	NDE Solutions L.L.C.	L05879	College Station	25	10/13/09
Throughout TX	N-Spec Quality Services Inc.	L05113	Corpus Christi	38	10/12/09
Throughout TX	Wilson Inspection X-Ray	L04469	Corpus Christi	63	10/08/09
Throughout TX	National Inspection Services L.L.C.	L05930	Crowley	26	10/12/09
Throughout TX	IRISNDT Inc.	L04769	Deer Park	81	10/01/09
Throughout TX	IRISNDT Inc.	L04769	Deer Park	82	10/13/09
Throughout TX	Professional Service Industries Inc.	L00203	Houston	126	10/06/09
Throughout TX	Halliburton Energy Services Inc.	L03284	Houston	36	10/06/09
Throughout TX	Mandes Inspection & Testing Services Inc.	L05220	Houston	67	10/02/09
Throughout TX	Halliburton Energy Services Inc.	L00442	Houston	119	10/14/09
Throughout TX	Acuren Inspection Inc.	L01774	La Porte	260	10/06/09
Throughout TX	Master Industries Inc.	L05872	Liberty	23	10/14/09
Throughout TX	Hi-Tech Testing Service Inc.	L05021	Longview	80	10/08/09
Throughout TX	Hi-Tech Testing Service Inc.	L05021	Longview	81	10/14/09
Throughout TX	Anatec Texas Inc.	L04865	Nederland	81	10/07/09
Throughout TX	T. C. Inspection Inc.	L05833	Oyster Creek	39	10/14/09

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Throughout TX	Techcorr USA L.L.C.	L05972	Palestine	69	10/06/09
Throughout TX	Petrochem Inspection Services Inc.	L04460	Pasadena	99	10/08/09
Throughout TX	Fugro Consultants Inc.	L04322	Pasadena	102	10/15/09
Throughout TX	Conam Inspection & Engineering Inc.	L05010	Pasadena	171	10/05/09
Throughout TX	Texas Gamma Ray L.L.C.	L05561	Pasadena	91	10/06/09
Throughout TX	Midwest Inspection Services	L03120	Perryton	117	10/15/09
Throughout TX	Catch-A-Fault	L02725	Ponder	23	10/06/09
Throughout TX	City Public Service	L02876	San Antonio	25	10/13/09
Tomball	Tomball Hospital Authority dba Tomball Regional Hospital	L02514	Tomball	49	10/05/09
Tyler	Trinity Mother Frances Health System	L01670	Tyler	148	10/05/09
Wichita Falls	Jerry K. Myers, M.D. Associated dba Breast Center of Texoma	L06221	Wichita Falls	01	10/05/09

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Borger	Chevron Phillips Chemical	L05181	Borger	16	10/12/09
Throughout TX	Guardian Industries Corporation	L05213	Corsicana	07	10/14/09
Throughout TX	Luminant Mining Company L.L.C. dba Luminant Mining - Three Oaks Mine	L04316	Elgin	25	10/13/09
Throughout TX	Goolsby Testing Laboratories Inc.	L03115	Humble	97	10/05/09
Throughout TX	The Premcor Refining Group Inc.	L04871	Port Arthur	16	10/07/09
Throughout TX	ETTL Engineers & Consultants Inc.	L01423	Tyler	36	10/05/09

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Groves	Renaissance Hospitals Inc.	L02091	Groves	32	10/09/09

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - Mail Code 2835, P.O. Box 149347, Austin, Texas 78714-9347. For information call (512) 834-6688.

TRD-200904736

Lisa Hernandez
General Counsel
Department of State Health Services
Filed: October 19, 2009

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Texas Department of Housing and Community Affairs

2010 Emergency Shelter Grants Program Notice of Funding Availability

I. Background and Purpose of Emergency Shelter Grant Program Notice of Funding Availability.

The Emergency Shelter Grants Program (ESGP), funded through the U.S. Department of Housing and Urban Development, is to be utilized for the rehabilitation or conversion of buildings for use as emergency shelter for the homeless, for the payment of certain operating expenses and essential services in connection with emergency shelters for the homeless, and for homelessness prevention activities. The program is designed to be the first step in a continuum of assistance to enable homeless individuals and families to move toward independent living, as well as to prevent homelessness. The objectives of the ESGP shall be to: help improve the quality of emergency shelters for the homeless; help meet the costs of operating and maintaining emergency shelters; provide essential services so that homeless individuals have access to the assistance they need to improve their situation; and provide emergency intervention assistance to prevent homelessness.

The Texas Legislature designated the Texas Department of Housing and Community Affairs (the Department) to administer this program pursuant to §2306.094, Texas Government Code.

The Department has not been notified of the ESGP award amount for Texas in FY 2010. However, the Department anticipates receiving approximately $5 million for FY 2010. Funding availability is contingent on the amount of ESGP funds received from the U.S. Department of Housing and Urban Development.

II. NOFA.

The Department will accept applications in response to the 2010 ESGP NOFA. ESGP funds will be made available to eligible applicants to carry out the purpose of the Emergency Shelter Grants Program based on this statewide competitive NOFA process.

III. ESGP NOFA Qualifications.

Applicants responding to this NOFA must meet the qualifications of the NOFA. Eligible applicants include cities and counties and private non-profit organizations with an existing status as a §501(c) tax-exempt entity as defined by the Internal Revenue Service. Private nonprofit organizations applying for ESGP funds must be established for charitable purposes and whose activities include, but are not limited to, the promotion of social welfare and the prevention or elimination of homelessness.

Applicants that are awarded ESGP funds must match their award amount with an equal or greater amount of resources other than ESGP funds.

IV. Contract Period.

The contract period will be September 1, 2010 through August 31, 2011.

V. Reimbursements.

Subrecipients will be paid on a reimbursement basis and will only be issued a one time advance during the first month of the contract.

VI. Application Deadline and Availability.

The 2010 ESGP NOFA will be posted on the Department's website: http://www.tdhca.state.tx.us/cs.htm#ESGP and organizations on the Department's ESGP interested party list and the Department's list serve will receive an e-mail notification that the NOFA is available on the Department's website.

Deadline for Receipt: Thursday, December 17, 2009 by 5:00 p.m. CST

Mailing Address:

Mr. Stuart P. Campbell, Manager

Community Services Section

Texas Department of Housing and Community Affairs

P.O. Box 13941

Austin Texas 78711-3941

(All U.S. Postal Service including Express)

Courier Delivery:

221 East 11th Street, 1st Floor

Austin, Texas 78701

(FedEx, UPS, Overnight, etc.)

Hand Delivery: If you are hand delivering the application, contact J. Al Almaguer at (512) 475-3908 (al.almaguer@tdhca.state.tx.us) or Rita Gonzales-Garza at (512) 475-3905 (rita.garza@tdhca.state.tx.us) when you arrive at the lobby of our building for application acceptance.

Questions: Questions pertaining to the content of the 2010 ESGP NOFA or eligible activities may only be directed to Rita Gonzales-Garza at (512) 475-3905 (rita.garza@tdhca.state.tx.us) and J. Al Almaguer at (512) 475-3908 (al.almaguer@tdhca.state.tx.us).

TRD-200904799
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 21, 2009

♦ ♦ ♦

2010/2011 Texas Bootstrap Loan Program Notice of Funding Availability

The Texas Department of Housing and Community Affairs (TDHCA), through its Office of Colonia Initiatives (OCI), is pleased to announce the availability of approximately $11,625,833 of State of Texas Housing Trust Funds for the Texas Bootstrap Loan Program. The purpose of the funding is to purchase land and/or build new residential or improve existing residential housing through self-help construction methodologies for very low and extremely low income individuals and/or families (Owner-Builders) including persons with special needs.

In an effort to attract a diverse group of nonprofit organizations that will serve various populations throughout the state and improve upon the efficiency of the traditional funding method, a reservation system will be utilized with this Notice of Funding Availability (NOFA). Nonprofit organizations must be certified by TDHCA as a Nonprofit Owner-Builder Housing Provider (NOHP) and must have executed a Loan Origination Agreement (LOA); in order to utilize the reservation system to secure these funds for an Owner-Builder Applicant.

In order for a nonprofit organization to be certified by TDHCA as a NOHP, the nonprofit organization must also qualify as a tax-exempt organization listed under §501(c)(3) of the Internal Revenue Code of 1986.

Nonprofit Owner-Builder Housing Provider Requirements.

Designation as a NOHP and subsequent execution of an LOA will entitle nonprofits to:

(1) Qualify potential Owner-Builders for loans under this program.

(2) Assist Owner-Builders in constructing or rehabilitating their home.

(3) Originate and/or service loans in compliance with Texas Bootstrap Loan Program Rules and Guidelines.

(4) Provide Owner-Builder education classes such as:

(a) financial responsibilities of an Owner-Builder, including the consequences of an Owner-Builder's failure to meet those responsibilities;

(b) building of housing by Owner-Builders;

(c) resources for low-cost building materials available to Owner-Builders; and

(d) resources for building assistance available to Owner-Builders.

The NOHP state certification application may be downloaded from TDHCA's web-site located at http://www.tdhca.state.tx.us/oci/bootstrap.jsp.

Owner-Builder Eligibility Requirements.

To be eligible for up to a $45,000 loan from TDHCA, an Owner-Builder:

(1) Must not have an annual income that exceeds 60 percent, as determined by TDHCA, of the greater of the state or local Area Median Family Income (AMFI), when combined with the income of any person who resides with the Owner-Builder.

(2) Must have resided in this state for the preceding six (6) months.

(3) Must have successfully completed an Owner-Builder education class.

(4) Must execute a Self-Help Agreement committing to provide through personal labor at least 65 percent of the labor necessary to build or rehabilitate the proposed housing working through a state-certified Nonprofit Owner-Builder Housing Program (NOHP); or provide an amount of labor equivalent to 65 percent in connection with building or rehabilitating housing for others through a state certified NOHP; provide through the noncontract labor of friends, family, or volunteers and through personal labor at least 65 percent of the labor necessary to build or rehabilitate the proposed housing by working through a state certified NOHP or if due to a documented disability or other limiting circumstances the Owner-Builder cannot provide the amount of personal labor otherwise required, provide through the noncontract labor of friends, family or volunteers at least 65 percent of the labor necessary to build or rehabilitate the proposed housing by working through a state certified NOHP.

Program Guidelines.

TDHCA is required under §2306.753(d) of the Texas Government Code, to set aside at least two-thirds ($7,754,431) of the available funds for Owner-Builders whose property is located in a county that is eligible to receive financial assistance under Subchapter K, Chapter 17, of the Water Code. The Texas Water Development Board considers a county eligible to receive financial assistance under Subchapter K, Chapter 17, Water Code, if: 1) the county contains an area that meets the criteria for an economically distressed area under §17.921(1), Water Code; and 2) the county has adopted and enforces the model subdivision rules under §16.343, Water Code. The remainder of the funding, one-third ($3,874,402), will be available statewide through the Regional Allocation Formula (RAF) for sixty (60) days with a collapse of regional funds after that time to be utilized on a first-come, first-serve basis.

The amounts available for distribution are as follows:

$7,754,431 -- Economically Distressed Areas (EDA)/Two-Third (2/3) Set-Aside

$3,871,402 -- Balance of State/One-Third (1/3) Set-Aside

Currently the following counties meet the criteria to qualify under the definition for an economically distressed area/two-third (2/3) set-aside:

Bee, Brewster, Cameron, Coryell, Dimmit, Duval, El Paso, Falls, Frio, Grimes, Harris, Hays, Henderson, Hidalgo, Hudspeth, Jeff Davis, Jim Hogg, Jim Wells, Kerr, Kinney, La Salle, Liberty, Marion, Maverick, McCulloch, Newton, Nueces, Palo Pinto, Polk, Presidio, Real, Reeves, Sabine, San Patricio, Schleicher, Somervell, Starr, Terrell, Trinity, Uvalde, Val Verde, Webb, Willacy, Zapata and Zavala.

The balance of the state one-third (1/3) set-aside funding made available under this NOFA is subject to the Regional Allocation Formula (RAF) until January 1, 2010. Formula being utilized is the most current and presently approved RAF as follows:

REGIONAL ALLOCATION FORMULA (RAF)

Region	Place for Geographical Reference	Regional Funding Amount	Regional Funding %	Rural Funding Amount	Rural Funding %	Urban Funding Amount	Urban Funding %
1	Lubbock	$129,427	3.3%	$79,490	61.4%	$49,937	38.6%
2	Abilene	$79,406	2.1%	$50,544	63.7%	$28,862	36.3%
3	Dallas/Fort Worth	$886,364	22.9%	$66,701	7.5%	$819,664	92.5%
4	Tyler	$205,468	5.3%	$124,300	60.5%	$81,168	39.5%
5	Beaumont	$81,588	2.1%	$51,449	63.1%	$30,139	36.9%
6	Houston	$825,327	21.3%	$44,720	5.4%	$780,607	94.6%
7	Austin/Round Rock	$163,786	4.2%	$12,631	7.7%	$151,155	92.3%
8	Waco	$167,144	4.3%	$45,259	27.1%	$121,885	72.9%
9	San Antonio	$263,818	6.8%	$37,645	14.3%	$226,174	85.7%
10	Corpus Christi	$174,308	4.5%	$72,701	41.7%	$101,607	58.3%
11	Brownsville/Harlingen	$641,079	16.6%	$199,824	31.2%	$441,254	68.8%
12	San Angelo	$91,700	2.4%	$33,721	36.8%	$57,979	63.2%
13	El Paso	$161,986	4.2%	$26,239	16.2%	$135,747	83.8%
	Total	**$3,871,402**	**100.0%**	**$845,224**	**21.8%**	**$3,026,178**	**78.2%**

Per household assistance from TDHCA for any Texas Bootstrap Loan Program loans cannot exceed $45,000 per household pursuant to §2306.754(b) of the Texas Government Code. The Owner-Builder must obtain the amount necessary that exceeds $45,000 from other sources of funds including other Department funds with the exception of funds being utilized to implement the Texas Bootstrap Loan Program. The total amount of amortized repayable loans made by TDHCA and other entities to an Owner-Builder under the program may not exceed $90,000 pursuant to §2306.754(b) of the Texas Government Code. For purposes of this program, a grant includes a forgivable loan. Projects utilizing additional non-TDHCA resources will be required to provide additional documentation identifying the sources of these additional funds and information about their rates and terms.

A loan made by TDHCA shall be secured by a first (1st) lien on the real property if the TDHCA's loan is the largest amortized, repayable loan secured by the real property; or

TDHCA may accept a parity lien position if the original principal amount of the leveraged loan is equal to or greater than TDHCA's loan; or

TDHCA may accept a subordinate lien position if the original principal amount of the leveraged loan is at least $1,000 or greater than TDHCA's loan. However liens related to other subsidized funds provided in the form of grants and nonamortizing loans, such as deferred payment or forgivable loans, must be subordinate to TDHCA's loan.

In order to submit an Owner-Builder loan application for reservation, an NOHP that has received a program award in the past must be meeting all performance benchmarks as outlined in their current contract or agreement and must have an active LOA with TDHCA.

Reservation System Guidelines.

After executing an LOA the NOHP may begin to submit loan applications on behalf of the Owner-Builder applicant. Reservations of funds are available on first-come, first-serve basis. If more than one Owner-Builder application is submitted they will be processed in the order entered into the reservation system.

There will be no expedited applications except for an Owner-Builder applicant with an annual income of less than $17,500.

After registering the Owner-Builder applicant, TDHCA must receive the completed Application/Compliance Package (Exhibit 9 of the Texas Bootstrap Loan Program Manual) within ten (10) business days of the date the registration was entered into the Reservation system. Registration of an Owner-Builder applicant does not guarantee funding. TDHCA Office of Colonia Initiatives (OCI) staff will review within ten (10) business days of receipt the Application/Compliance Package to ensure that the Owner-Builder applicant meets all program rules and guidelines. The NOHP will be notified in writing of TDHCA's determination.

If the Owner-Builder applicant is deemed eligible; funds will be reserved for one (1) year from the date of issuance of the Applicant Eligibility Letter (Exhibit 11 of the Texas Bootstrap Loan Program Manual). Owner-Builder applicant will not be required to re-qualify for the program if the Owner-Builder applicant closes on the loan on or before the expiration date stated on the applicant eligibility letter issued by TDHCA.

If the Owner-Builder fails to close on the loan on or before the expiration date stated on the Applicant Eligibility Letter, the Owner-Builder applicant will be required to re-qualify for the program; regardless if an extension has been granted.

The NOHP, in accordance with the Texas Bootstrap Loan Program Rules, will be given a 6 percent administration fee only upon completion of the house and closing of each mortgage loan. If TDHCA staff is unable to deem the Owner-Builder applicant eligible the NOHP will be notified in writing of the reason(s) by Applicant Deemed Ineligible Letter (Exhibit 13 of the Texas Bootstrap Loan Program Manual).

Incomplete Application/Compliance Packages will not be accepted. All incomplete packages will be returned to the NOHP and the reservation will be cancelled. The NOHP must resubmit a new reservation and the Application/Compliance Package to TDHCA in order to be reconsidered for funding.

Maximum Reservations allowed for an NOHP.

Under the Economically Distressed Areas (EDA)/Two-Third (2/3) Set-Aside as noted in §2306.753(d) the NOHP will be allowed up to $900,000 worth of reservations at any give time.

Under the Balance of the State set-aside the NOHP will be allowed up to $450,000 worth of reservations at any given time.

The NOHP may enter additional Reservations after a loan has closed and all required closing documents have been submitted to TDHCA for funding.

Modification of Loan Reservation.

After a Reservation has been secured and the Owner-Builder applicant has been deemed eligible to participate in the Program, the NOHP must notify TDHCA of any changes to the Owner-Builder application, such as a cancellation, change in the sales price or change in the loan amount (subject to availability of funds). The NOHP will not be permitted to change, exchange, replace or switch Owner-Builder applicants once the loan has been registered; unless construction has commenced and one of the following events has occurred: death, illness, divorce, loss of income or nonperformance by Owner-Builder applicant.

Performance Benchmarks.

In an effort to expedite expenditure of funds, the NOHP will be required to meet specific performance benchmarks on the home within twelve (12) months of the Applicant Eligibility Letter. If the NOHP fails to meet the required benchmarks, the Reservation may be subject to cancellation in accordance with the LOA and Texas Bootstrap Loan Program Rules. TDHCA may provide one forty-five (45) day extension to benchmark deadlines due to extenuating circumstances that were beyond the Owner-Builder's and/or the NOHPs control. If the NOHP cannot meet the required benchmarks after the forty-five (45) day extension, the Reservation will be cancelled. In order to receive another Reservation on the same Owner-Builder applicant the NOHP will be instructed to submit an updated application if funds are available to ensure the Owner-Builder applicant meets all Texas Bootstrap Loan Program Rules and guidelines. Once an Owner-Builder has been deemed eligible and funds have been reserved, depending on the type of loan being requested the NOHP must meet the following performance benchmarks.

Purchase Money Loan.

(1) Within ninety (90) days of the Applicant Eligibility Letter date the NOHP must have initiated the preconstruction process which includes the homeownership education and counseling programs of the organization.

(2) Within one-hundred-eighty (180) days of the Applicant Eligibility Letter date construction must have started on the unit; and

(3) Within one (1) year of the Applicant Eligibility Letter date the unit must be 100 percent complete and the purchase money loan must have closed with the Owner-Builder Applicant.

Interim and Residential Construction Loans.

(1) Within ninety (90) days of the Applicant Eligibility Letter date, the loan must close and construction must have started on the unit;

(2) Within one-hundred-eighty (180) days of the Applicant Eligibility Letter date, the unit must be at 40 percent completion;

(3) Within two-hundred-seventy (270) days of the Applicant Eligibility Letter date, the unit must be at 80 percent completion; and

(4) Within one (1) year of the Applicant Eligibility Letter date, the unit must be 100 percent complete and the purchase money loan must have closed with the Owner-Builder Applicant.

If you need more information regarding this NOFA please call Raul Gonzales with the Office of Colonia Initiatives at (800) 462-4251 or you may email your request to raul.gonzales@tdhca.state.tx.us.

TDHCA will begin accepting reservations at 8:00 a.m. on November 2, 2009, and will continue to accept reservations on an ongoing basis until August 31, 2011 or until such time as all funding has been committed.

TRD-200904798
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 21, 2009

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Notice to Public and to All Interested Mortgage Lenders - Mortgage Credit Certificate Program

The Texas Department of Housing and Community Affairs (the Department) intends to implement a Mortgage Credit Certificate Program (the Program) to assist eligible very low, low and moderate income first-time homebuyers purchase a residence located within the State of Texas.

Under the Program, a first-time homebuyer who satisfies the eligibility requirements described below may receive a federal income tax credit in an amount equal to the product of the certificate credit rate established under the Program and the interest paid or accrued by the homeowner during the taxable year on the remaining principal of the certified indebtedness amount incurred by the homeowner to acquire the principal residence of the homeowner; provided that such credit allowed in any taxable year does not exceed $2,000. In order to qualify to receive a credit certificate, the homebuyer must qualify for a conventional, FHA, VA or other home mortgage loan from a lending institution and must meet the other requirements of the Program.

The credit certificates will be issued to qualified mortgagors on a first-come, first-served basis by the Department, which will review applications from lending institutions and prospective mortgagors to determine compliance with the requirements of the Program and determine that credit certificates remain available under the Program. No credit certificates will be issued prior to ninety (90) days from the date of publication of this notice nor after the date that all of the credit certificate amount has been allocated to homebuyers and in no event later than the date permitted by federal tax law.

In order to satisfy the eligibility requirements for a certificate under the Program:

(a) the prospective residence must be a single-family residence located within the State of Texas that can be reasonably expected to become the principal residence of the mortgagor within a reasonable period of time after the financing is provided;

(b) the prospective homebuyer's current income must not exceed:

(i) for families of three or more persons, 115% (140% in certain targeted areas or in certain cases permitted under applicable provisions of the Internal Revenue Code of 1986, as amended (the Code)) of the area median income; and

(ii) for individuals and families of two persons, 100% (120% in certain targeted areas or in certain cases permitted under applicable provisions of the Code) of the area median income;

(c) the prospective homebuyer must not have owned a home as a principal residence during the past three years (except in the case of certain targeted area residences or in certain cases permitted under applicable provisions of the Code);

(d) the acquisition cost of the residence must not exceed 90% (110%, in the case of certain targeted area residences or in certain cases permitted under applicable provisions of the Code) of the average area purchase price applicable to the residence; and

(e) no part of the proceeds of the qualified indebtedness may be used to acquire or replace an existing mortgage (except in certain cases permitted under applicable provisions of the Code). Pursuant to the Gulf Opportunity Zone Act of 2005, residences in certain areas affected by Hurricane Rita are treated as targeted area residences through December 31, 2010. To obtain additional information on the Program, including the boundaries of current targeted areas, as well as the current income and purchase price limits (which are subject to revision and adjustment from time to time by the Department pursuant to changes in applicable federal law and Department policy), please contact Cathy Gutierrez at the Texas Department of Housing and Community Affairs, 221 East 11th Street, Austin, Texas 78701-2410; telephone (512) 475-0277.

The Department intends to maintain a list of single family mortgage lenders that will participate in the Program by making loans to qualified holders of these mortgage credit certificates. Any lender interested in appearing on this list or in obtaining additional information regarding the Program should contact Cathy Gutierrez at the Texas Department of Housing and Community Affairs, 221 East 11th Street, Austin, Texas 78701-2410; (512) 475-0277. The Department may schedule a meeting with lenders to discuss in greater detail the requirements of the Program.

This notice is published in satisfaction of the requirements of §25 of the Code and Treasury Regulation §1.25-3T(j)(4) issued thereunder regarding the public notices prerequisite to the issuance of mortgage credit certificates and to maintaining a list of participating lenders.

TRD-200904797
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 21, 2009

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Notice of Public Hearing

The Texas Department of Housing and Community Affairs (TDHCA) will hold a public hearing to receive comments on a proposed Amendment to the American Recovery and Reinvestment Act (ARRA)-Funded Weatherization Assistance Program Plan. TDHCA proposes to file an Amendment to the ARRA-Funded Weatherization Assistance Program Plan. The amendment will reflect funding decisions of the cities that have elected to work within the existing subrecipient provider network and will incorporate changes agreed to by the U.S. Department of Energy Headquarters.

The public hearing will be held at 9:30 a.m. on Monday, November 9, 2009 in Room #140, John H. Reagan Building, 105 W. 15th Street, Austin, Texas 78701. At the hearing, a representative from TDHCA will describe the proposed Amendment to the ARRA-Funded Weatherization Assistance Program Plan.

Local officials and citizens are encouraged to participate in the hearing process. Written and oral comments received will be used to amend the ARRA-Funded Weatherization Assistance Program Plan. Written comments from those who cannot attend the hearing in person may be provided by close of business at 5:00 p.m. on November 9, 2009, to Lolly Caballero, Senior Planner, Energy Assistance Section, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711 or by electronic mail to lolly.caballero@tdhca.state.tx.us or by fax to (512) 475-3935. A copy of the proposed changes may be obtained, after October 30, 2009, through TDHCA's website, http://www.tdhca.state.tx.us/ea/index.htm or by calling Ms. Caballero at (512) 475-0471 or by writing to Ms. Caballero at the TDHCA address given above.

Individuals who require auxiliary aids or services for this meeting should contact Gina Esteves, ADA responsible employee, at (512) 475-3943 or Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Non-English speaking individuals who require interpreters for this meeting should contact Lolly Caballero, at (512) 475-0471 at least three (3) days before the meeting so that appropriate arrangements can be made.

Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

TRD-200904800
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 21, 2009

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Texas Department of Insurance

Company Licensing

Application to change the name of FIRST LIFE AMERICA CORPORATION to TRINITY LIFE INSURANCE COMPANY, a foreign life company. The home office is in Topeka, Kansas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200904793
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 21, 2009

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Notice of Public Hearing

The Commissioner of Insurance (Commissioner) will hold a public hearing under Docket No. 2706 on November 18, 2009 beginning at 9:30 a.m. in Room 100 of the William P. Hobby, Jr., State Office Building, 333 Guadalupe Street, in Austin, Texas, to consider the Texas Windstorm Insurance Association's (Association) petition for proposed increases to the current maximum limits of liability for windstorm and hail insurance policies covering the following: residential dwellings and individually owned townhouses and associated contents; contents of an apartments, condominiums, or townhouses; commercial structures and associated contents; and governmental structures and associated contents for policies of windstorm and hail insurance. The petition wais submitted pursuant to Texas Insurance Code §§2210.502 - 2210.504.

This notice is made pursuant to the Texas Insurance Code §2210.504(a), which requires notification notice and a hearing prior to the Commissioner's approval, disapproval, or modification of the Association's proposed adjustments to the limits of liability for its policies of windstorm and hail insurance policies. This proceeding is

exempt from the contested case procedures in Texas Insurance Code §40.002 and §40.003, Chapter 40.

A copy of the Association's petition is available for review in the Office of the Chief Clerk, MC 113-2A, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701. To request a copy of the petition (Reference No. P-1009-04), contact Sylvia Gutierrez at (512) 463-6327 (refer to Reference No. P-1009-04). For additional information, interested parties may contact Marilyn Hamilton, Property and Casualty Associate Commissioner, by mail at MC 104-PC, Texas Department of Insurance, 333 Guadalupe, Austin, Texas 78701; or by phone call at (512) 322-2265.

TRD-200904761
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 19, 2009

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Public Utility Commission of Texas

Notice of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on October 16, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Northland Cable Ventures LLC for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 37571 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include the municipal boundaries of Gun Barrel City, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All inquiries should reference Project Number 37571.

TRD-200904782
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 20, 2009

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Notice of Application for Declaratory Ruling Approving a Limited Issue Rate Proceeding

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on October 13, 2009, for declaratory ruling approving a limited issue rate proceeding.

Docket Style and Number: Application of Southwestern Electric Power Company for Declaratory Ruling Approving a Limited Issue Rate Proceeding. Docket Number 37565.

The Application: Southwestern Electric Power Company (SWEPCO) filed an application with the Public Utility Commission of Texas (commission) for approval of a limited issue rate proceeding for purposes of including in rate base the company's plant-in-service investment in the J. Lamar Stall Power Plant. SWEPCO requested a good cause exception to P.U.C. Substantive Rule §22.243(b), which requires the filing of a rate package in connection with a rate proceeding under Public Utility Regulatory Act, Chapter 36, Subchapter C.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 37565.

TRD-200904783
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 20, 2009

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Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of a joint application for sale, transfer, or merger filed with the Public Utility Commission of Texas (commission) on October 16, 2009, pursuant to the Public Utility Regulatory Act, TEXAS UTILITY CODE ANNOTATED §14.101 and §37.154 (Vernon 2007 & Supplement 2009) (PURA).

Docket Style and Number: Joint Application of AEP Texas Central Company and Electric Transmission Texas, LLC to Transfer Certificate Rights and for Approval of Transfer of Facilities in Nueces County, Texas, Docket Number 37574.

The Application: AEP Texas Central Company (TCC) and Electric Transmission Texas, LLC (ETT) (collectively, applicants) filed a joint application for approval of their proposal to transfer from TCC to ETT certain existing and under construction transmission facilities located in Nueces County, Texas and the associated certificate of convenience and necessity (CCN) rights for those transmission facilities.

TCC will sell to ETT, the following facilities and projects: Nueces Bay Generation Interconnection Projects; and Barney Davis Generation Interconnection Projects.

The costs related to the facilities proposed to be transferred will be reflected in upcoming transmission cost of service filings planned by TCC and ETT and the facilities will be transferred to ETT at TCC's net book value at the time of the transfer. The net book value of TCC assets and construction work in progress proposed to be transferred to ETT is approximately $59.5 million. If approved and subject to conditions precedent, TCC and ETT will complete the transaction and update the amounts after the transaction closes.

TRD-200904781
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 20, 2009

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Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on October 13, 2009, for an amendment to certificated service area boundaries within Edwards County, Texas.

Docket Style and Number: Joint Application of Pedernales Electric Cooperative, Inc. and AEP Texas North Company to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Edwards County. Docket Number 37563.

The Application: The proposed boundary change is for release of territory from AEP Texas North Company (TNC) to Pedernales Electric Cooperative (PEC) so that PEC can provide service to a customer in the most cost-effective manner. PEC has an existing distribution line much closer than TNC and can provide service at a significantly lower cost.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than November 6, 2009 by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 37563.

TRD-200904662
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2009

♦ ♦ ♦

South East Texas Regional Planning Commission

Request for Proposals for Management Services

Purpose of The Request - The South East Texas Regional Planning Commission (SETRPC) is seeking to enter into a contract with a competent management/consulting firm or individuals to assist in providing feasibility reviews and construction inspections for rehabilitation and/or reconstruction (including elevation, if necessary) of single family owner-occupied housing in support of the Hurricane Ike Disaster Recovery Program. The contracted firm will complete inspections, work write-ups, and cost estimates for single family homes in the SETRPC service area affected by Hurricane Ike. In addition, the contracted firm will assist SETRPC in conducting specific oversight activities of construction contracts. The following outlines the request for proposals.

I. **Background** - SETRPC, through either a pre-application process or by a review of Federal Emergency Management Agency (FEMA), City, and/or County information concerning the damage resulting from Hurricane Ike, has, and continues to, identify single family homes as eligible for funding from the U.S. Department of Housing and Urban Development to remediate the unmet housing needs of the area. The Community Development Block Grant Disaster Recovery Program (Program) requires that assisted housing units meet International Residential Code of 2003 as amended (IRC) and local health and safety codes at project completion. The type of activity being completed determines the minimum construction standards that must be met.

II. **Scope of Work** - The contracted firm or individual under this Request for Proposal (RFP) must provide management services to SETRPC as detailed in the specifications (Attachment 1). This RFP is for management services only. These management services include, but are not limited to, the following:

a. Reviewing documentation maintained by SETRPC related to this RFP.

b. Contacting applicants approved for funding.

c. Conducting an inspection of each respondent's home for compliance with minimum construction standards.

d. Completing work write-ups and cost estimates on each home approved for assistance. Work write-ups and cost estimates for rehabilitation work must include construction components necessary to meet IRC and all other federal, state, and local construction and health and safety code requirements at project completion. Work write-ups and cost estimates for reconstruction must include construction components necessary to meet IRC, International Energy Conservation Code (IECC), single family accessibility requirements, and all other federal, state, and local construction and health and safety code requirements at project completion.

e. Creating plans and specifications for reconstructed housing units that may be duplicated and adapted for all reconstructed properties. The plan must meet the IRC, IECC, single family accessibility requirements, and all other federal, state, and local construction, health and safety code requirements upon project completion (optional bid item).

f. Complete Bid Packages for each home to be repaired (including work write-ups and cost estimates.) Each home must be bid separately.

g. Assist SETRPC in advertising, recruiting, reviewing and procuring contractors. Contractors must be in good standing with Texas Residential Construction Commission (TRCC).

h. Review and approve any deficiencies or unforeseen conditions noted by contractor bid process, including re-inspection, if required.

i. Assist SETRPC staff with sealed bid opening and review bids, if applicable.

j. Advise SETRPC staff regarding contractual issues if requested.

k. Complete the following inspections for each property:

1. Rehabilitation.

A. 50% Complete Inspection

B. 100% Complete Inspection

C. Punch List inspection if necessary

2. Reconstruction

A. 33% Complete Inspection

B. 66% Complete Inspection

C.100% Complete Inspection

D. Punch List Inspection if necessary

l. Complete final walk through on all properties and create punch list.

m. Re-inspect as required and approve final retainage draw.

III. **Statement of Qualifications** - SETRPC is seeking to contract with a competent management firm or individual that has had experience in grant and contract administration of single family construction activities. Specifically, SETRPC is seeking responses from management firms or individuals with the following qualifications:

* Experience in managing federally funded single family construction programs.

* Experience with the CDBG Housing Rehabilitation Program, through either the state of Texas CDBG Housing Rehabilitation Program or other local CDBG Housing Rehabilitation programs within the state of Texas.

IV. **Evaluation Criteria** - The proposals received will be evaluated and ranked by SETRPC staff according to the following criteria:

Criteria Maximum Points

Experience 35

Work Performance 20

Capacity to Perform 10

Proposed Cost 25

Affirmative Marketing Presentation 5

Total 100

Applicants will then give a presentation to SETRPC staff and the Hurricane Ike Community Development Block Grant Housing Advisory Committee (HIHAC). HIHAC will then award the contract based on the ranking and recommendation of SETRPC and the presentation of the Applicants.

V. **Submission Requirements** - All responses to this RFP must include the following:

a. *Cover letter* - Include a brief overview of your firm and your interest in this RFP, or if an individual please submit a resume. Provide a contact name, phone number, fax number, and e-mail address, if available.

b. *Statement of Qualifications* - A brief summary of your qualifications as it relates to this RFP. To support the Statement of Qualifications, the following should be included in the response:

1. Experience - Submit resumes for key staff that would be involved in this project. Provide a synopsis not to exceed 2 pages (12 point font) summarizing your experience in federally funded projects of similar size and scope (in excess of $15,000,000.00) within the last three to five years.

2. Work Performance - Submit at least three (3) references for whom you have provided inspection services and/or work write-ups for rehabilitation or new construction activities, including institutional customers such as units of local government, governmental entities, or public agencies.

c. *Capacity to Perform* - Submit a proposed schedule and timeline for work to be completed. Also provide the number of staff available for each identified task (Based on SETRPC's experience with Hurricane Rita, SETRPC expects a minimum of eight (8) inspectors will be needed to complete the project in a timely manner), location of your offices, a list of potential subcontractors, and any other details regarding your firm's "readiness to proceed" including previous participation in federally funded program.

1. Submit your 2008 Financial Statement showing gross sales in excess of $750,000.00.

2. Also submit:

A. A sample initial inspection for single family unit.

B. A sample work write-up for single family unit.

C. A sample cost estimate for single family unit.

d. *Affirmative Marketing requirements* - SETRPC is an equal opportunity employer and encourages minority, women owned, low-income owned businesses and those located in census tracts which have been designated low income within our service area to submit a bid for the services described above. All firms should describe their policies, and procedures regarding outreach to minorities, women, and low income persons, their actual hiring practices and their subcontracting processes as they relate to affirmative hiring and procurement.

e. *Proposed Cost of Services* - Interested parties should provide a proposed cost of services that agrees with the proposed Scope of Work. The Proposed Cost Estimate must be made on a per home basis and must include all of the following services: **Contract Management, Financial Management, Record-keeping Requirements, Intake and Qualification, Re-Inspection and Verification of Complaints, Work Write-ups, Cost Estimate, Complete Bid Package, Procurement, Progress Inspection, and Final Walk Thru and Punch List.**

SETRPC will not use the lowest bid as the sole basis for entering into a contract.

f. *Financial Condition* - Provide a copy of the firms most recently audited financial statement, a complete organizational chart and the list of current contracts. Banking references may be provided for sole proprietorships, partnerships or smaller firms if audited financial statements are not available.

VI. **Deadline for Submission:** Complete sealed proposals must be submitted in person, by mail or other carrier by 4:00 p.m. on November 30, 2009. **NO LATE SUBMISSIONS WILL BE ACCEPTED. INCOMPLETE SUBMISSION WILL BE REVIEWED AS SUBMITTED.**

VII. SETRPC reserves the right to:

1. Contract with the most qualified bidder based on the criteria stated herein.

2. Throw out any or all bids that do not meet minimum qualifications.

3. Resubmit this RFP if adequate interest is not received.

SETRPC will enter into a contract with the awarded bidder.

VIII. **Time Lines and SETRPC Contact**

Responses must be received in the SETRPC's Offices on or before November 30, 2009 by 4:00 p.m.

Applications may be mailed or hand-delivered to:

South East Texas Regional Planning Commission

Attn: Jennifer Barclay

2210 Eastex Freeway

Beaumont, Texas 77703

a. Review will be conducted within 30 days of the due date.

b. Applicants will be notified within 45 days of the due date of a decision if any.

c. Contracting firm will have 15 days to review and sign contract.

d. Contracting firm will have 60 days to complete bid packages unless, otherwise, agreed to by the firm and the SETRPC.

e. Additional information can be requested in writing by contacting Jennifer Barclay at the address above, by fax at (409) 899-8680 or by e-mail at jbarclay@setrpc.org. All questions and responses will be made available to all applicants and shall be subject to the Open Records Act.

Open Records - Information submitted to SETRPC is public information and is available upon request with the Texas Information Act, chapter 552 of the Government Code (the act). A firm submitting any information it considers confidential as to trade secrets or commercial or financial information, which it desires not to be disclosed, must clearly identify all such information in its proposal. If such information, so identified by the firm is requested from SETRPC, the firm will be notified and given an opportunity to present its position to the Texas Attorney General, who shall make determination as to whether such information is exempted from disclosure under the Act. Information not clearly identified as confidential will be deemed to be non-confidential and will be made available by SETRPC upon request.

IX. **Cost Incurred Responding** - All costs directly or indirectly related to the preparation of the response to this RFP shall be the sole responsibility of and shall be borne by, the respondent firm.

Cost of Services Statement

Attachment I

I understand that the following services must be included in the cost estimate for each home:

Contract Management

Financial Management

Record-keeping Requirements

Intake and Qualification

Re-Inspection and Verification of Complaints

Work Write-ups

Cost Estimate

Complete Bid Package

Procurement, Progress Inspection

Final Walk Thru and Punch List

TRD-200904759
Jennifer Barclay
Legal Contract Specialist
South East Texas Regional Planning Commission
Filed: October 19, 2009

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Request for Proposals for Manufactured Homes

Purpose of The Request - In order to develop a pool of qualified manufacturers, the South East Texas Regional Planning Commission (SETRPC) is seeking bids from companies who specialize in the replacement of damaged homes with new manufactured (mobile) homes in support of its Hurricane Ike Disaster Recovery Program. Firms will be expected to transport and provide complete installation of the homes. The following outlines the request for proposals.

I. Background - SETRPC, through either a pre-application process or by a review of Federal Emergency Management Agency (FEMA), City, and/or County information concerning the damage resulting from Hurricane Ike, has, and continues to, identify single family homes as eligible for funding from the U.S. Department of Housing and Urban Development to remediate the unmet housing needs of the area. The Community Development Block Grant Disaster Recovery Program (Program) requires that assisted housing units meet minimum property standards and local health and safety codes at project completion. The type of activity being completed determines the minimum construction standards that must be met.

II. Scope of Work - The contracted firm or individual under this Request for Proposal (RFP) must provide replacement services to SETRPC as detailed in the specifications (Attachment 1). The contracted firm or individual under this RFP may also be required to provide the services describe in the potential additions to the specifications (Attachment 2).

III. Statement of Qualifications - SETRPC is seeking to contract with a competent manufacturer that has the ability to proceed.

IV. Evaluation Criteria - The proposals received will be evaluated and ranked according to the cost per unit and number of bedrooms.

a. Applicants may then give a presentation to SETRPC staff and the Hurricane Ike Community Development Block Grant Housing Advisory Committee (HIHAC). HIHAC will then award the contract based on the ranking and recommendation of SETRPC staff and the presentation of the Applicants.

V. Submission Requirements - All responses to this RFP must include the following:

a. Cover letter - Include a brief overview of your firm and your interest in this RFP. Provide a contact name, phone number, fax number, and e-mail address, if available.

b. Statement of Qualifications - A brief summary of your qualifications as it relates to this RFP. To support the Statement of Qualifications, the following should be included in the response:

1. Experience - Submit resumes for key staff that would be involved in this project. Provide a synopsis not to exceed 2 pages (12 point font) summarizing your experience in federally funded projects of similar size and scope within the last three to five years

2. Work Performance - Submit at least three (3) references for whom you have provided manufactured homes, including institutional customers such as units of local government, governmental entities, or public agencies.

c. Capacity to Perform - Submit a proposed schedule and timeline for work to be completed. Also provide the details regarding your firm's "readiness to proceed" including previous participation in federally funded programs.

d. Affirmative Marketing requirements - SETRPC is an equal opportunity employer and encourages minority, women owned, low-income owned businesses and those located in census tracts which have been designated low income within our service area to submit a bid for the services described above. All firms should describe their policies, and procedures regarding outreach to minorities, women, and low income persons, their actual hiring practices and their subcontracting processes as they relate to affirmative hiring and procurement.

e. Proposed Cost of Services - Interested parties should provide a proposed cost of services that agrees with the proposed Scope of Work. Items that should specifically be included are detailed in the cost of services schedule (see below). **SETRPC will not use the lowest bid as the sole basis for entering into a contract.**

f. Financial Condition - Provide a copy of the firms most recently Certified Public Accountant's prepared financial statement, a complete organizational chart and the list of current contracts. Banking references may be provided for sole proprietorships, partnerships or smaller firms if audited financial statements are not available.

NOTE: *The finalization of any actual purchase order may include additional or alternative features offered by the selected proposal(s). Therefore, if possible, please provide a list of all available features.*

VI. SETRPC reserves the right to:

1. Contract with the most qualified bidder based on the criteria stated herein.

2. Throw out any or all bids that do not meet minimum qualifications.

3. Resubmit this RFP if adequate interest is not received.

SETRPC will enter into a contract with the awarded bidder.

VII. Bid Submittals, SETRPC Contact and Time Lines

Complete sealed proposals must be submitted in person, by mail or other carrier. **NO LATE SUBMISSIONS WILL BE ACCEPTED. INCOMPLETE SUBMISSION WILL BE REVIEWED AS SUB-**

MITTED. Responses must be received in the SETRPC's Offices on or before December 1, 2009 by 4:00 p.m.

Applications may be mailed or hand-delivered to:

South East Texas Regional Planning Commission

2210 Eastex Freeway

Beaumont, Texas 77703

Attn: Jennifer Barclay

a. Review will be conducted within 30 days of the due date.

b. Applicants will be notified within 45 days of the due date of a decision if any.

c. Contracting firm will have 15 days to review and sign contract.

d. Contracting firm will have 60 days to complete bid packages unless, otherwise, agreed to by the firm and the SETRPC.

e. Additional information can be requested in writing by contacting Jennifer Barclay at the address above, by fax at (409) 899-8680 or by e-mail at jbarclay@setrpc.org. All questions and responses will be made available to all applicants and shall be subject to the Open Records Act.

Open Records - Information submitted to SETRPC is public information and is available upon request with the Texas Information Act, chapter 552 of the Government Code (the "act"). A firm submitting any information it considers confidential as to trade secrets or commercial or financial information, which it desires not to be disclosed, must clearly identify all such information in its proposal. If such information, so identified by the firm is requested from SETRPC, the firm will be notified and given an opportunity to present its position to the Texas Attorney General, who shall make determination as to whether such information is exempted from disclosure under the Act. Information not clearly identified as confidential will be deemed to be non-confidential and will be made available by SETRPC upon request.

VIII. Cost Incurred Responding - All costs directly or indirectly related to the preparation of the response to this RFP shall be the sole responsibility of and shall be borne by, the respondent firm.

Manufactured Homes Specifications

(Attachment I)

Wind Zone:

Structural:

2 X 6 Floor joists (16" O.C.) or 2 X 8 Floor joists (24" O.C.);

Plywood Floors;

2 X 4 Exterior Walls (16" O.C.)

5 X 5 Front & Back Porch with Steps

Interior:

Mini-Blinds throughout;

7 1/2" side-walls with vaulted ceilings;

White 6-panel Interior Doors;

Lever door handles;

2" white ceiling cove molding;

Ceilings Fans - Living Area and Master Bedroom

Glass Light Fixtures throughout home

Kitchen:

Picture-Frame Oak Cabinet Doors;

30" Kitchen Overhead Cabinets;

Laminate Counters

Appliances:

Basic Appliance package from major manufacturer (GE, Whirlpool, Maytag, etc.);

Include: Electric range 18cf Frost Free Refrigerator

Utilities:

200 AMP Total Electric;

30-gallon Electric Water Heater;

Insulation - R-22 Attic, R-11 Walls, R-11 Floors;

13 SEER Air Conditioning;

Electrical Hookups including meter pole;

Hookup water & sewer to existing systems

Baths:

One-piece Fiberglass Showers & Tub/showers;

Elongated porcelain commodes;

Decorative lighting over vanities;

Towel and toilet paper holders

Flooring:

Vinyl Flooring - Kitchen, bath, utility and entry

Exterior:

20-year Fiberglass Type "A" shingles;

Vinyl siding 2/full OSB Underlayment and Wind-wrap;

Vinyl, Dual Pane Windows;

36 X 80 Steel Insulated Front & Back Door - In-swing;

1 Pallet of Grass

Per specifications (above), please provide the following cost(s):

60' (2 bedroom, 2 bath)

76' (3 bedroom, 2 bath)

76' (4 bedroom, 2 bath)

Double Wide (4 bedroom, 2 bath) (min 1370 sq. ft.)

Potential Additions to Manufactured Homes Specifications

(Attachment 2)

The following is a list of potential additions that may need to be added to the proposed per unit cost of the manufactured housing unit, provided in Attachment 1, after inspection of the existing home:

* Demolition

* Dirt Work (price per load)

* Installation and Hook up of Septic System:

- Conventional

- Aerated

- Drip

* ADA Ramps

- 0-4 feet

- 4-7 feet

* Handicap Friendly Water Closet adjacent to a wall with safety bars (one designated bathroom) per UAS §4.26 (American Standard, or approved equal, minimum 16.5" height, elongated bowl and Moen chrome safety bars, or approved equal)

* Handicap Friendly Shower (one designated bathroom) per UFAS §4.34.5.5 (One-piece 60' fiberglass ADA Handicap shower with over-flow barrier Accessibility Professionals Model AP-TXSS6233BF75 - http://www.ada-showers.com/ada_shower_pdf/AP-TXSS6233BFF75.pd or approved equal)

* Handicap Friendly Bathtub with safety bars and drop-down seat (one designated bathroom) per UFAS §4.34.5.4 (Koral Model HTS731LH/736RH or approved equal)

* Install Emergency Alarms for visual/hearing impaired occupants for all floor plans (per UFAS §4.28) as an upgrade to IRC required alarm system

* All Vinyl Flooring throughout unit (12 mil Armstrong Cambray grade or approved equal)

* Dishwasher for ADA applicants

* Install Handicap Friendly 36" 6 panel interior doors where necessary

* Elevation

- 0-3 feet

- 3-6 feet

- Above 6 feet

TRD-200904758
Jennifer Barclay
Legal Contract Specialist
South East Texas Regional Planning Commission
Filed: October 19, 2009

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Request for Qualifications for Consultant for HOME Based Projects and Programs

Description:

The South East Texas Regional Planning Commission (SETRPC) is serving as the administrator for the Orange Regional HOME Consortium (ORHC), where the City of Orange serves as the responsible entity for the Counties of Hardin, Liberty, Orange, and unincorporated areas of Jefferson County. The ORHC provides a variety of grant-funded programs all aimed at providing safe, decent, and affordable housing to low income families. Under US Department of Housing and Urban (HUD) guidelines, ORHC funds are reserved for people at or below 80% of the average median family income for the respective area in which they live and are available through two basic housing-need programs: Rental Housing and/or Community Housing Development (CHDO). SETRPC is seeking a qualified consultant to provide underwriting and technical assistance to the Federal HOME regulations plus local ORHC requirements for multifamily applicants to ORHC.

Consulting Services will consist of the following tasks:

1. Consultant will provide underwriting of applications to the ORHC program.

2. Consultant will provide ongoing technical services to the SETRPC on an as-needed basis. Technical services may include site visits during the term of the contract.

3. Consultant will provide training to SETRPC staff and such other persons as required.

Frequency:

ORHC anticipates three to four underwritings each calendar year. ORHC will require technical assistance on an as needed basis.

Reimbursement:

ORHC will pay between $800 and $1,600 for underwriting services depending on deal requirements. ORHC will pay a billable rate of $110 per hour for technical services not to exceed forty thousand ($40,000) dollars for labor and expenses. Terms are 30 days net.

Minimum Qualifications:

1. HUD Certified HOME Regulations Specialist

a. Copy of Certificate or letter from US Department of Housing & Urban Development must be included in response

2. Minimum ten years experience with the HOME program

a. Shown on applicant's resume

3. Minimum five years experience in underwriting and/or development of multifamily projects, including low income housing tax credit developments

a. Shown on applicant's resume

Response Date:

Please respond by November 30, 2009.

Respond to:

If your company is interested and qualified to provide professional services to the ORHC, please send your proposal to David Dean via letter or e-mail. Proposals will need to include your company's qualifications and resume(s) and are due by 4:00 p.m. CST on November 30, 2009. Contact information is as follows:

South East Texas Regional Planning Commission

Attn: David Dean

2210 Eastex Freeway

Beaumont, TX 77703

(409) 899-8444 Ext 6303

ddean@setrpc.org

TRD-200904744
Jennifer Barclay
Legal Contract Specialist
South East Texas Regional Planning Commission
Filed: October 19, 2009

♦ ♦ ♦

Request for Qualifications for Consultant for CDBG Disaster Recovery Program

Description:

The South East Texas Regional Planning Commission (SETRPC) will be administering Community Development Block Grant (CDBG) Hurricane Ike Disaster Recovery funds for Hardin, Jefferson, and Orange Counties. SETRPC is seeking a qualified consultant to provide underwriting services for multi-family applicants and technical assistance in the development of policies, procedures, and guidelines for its multi-family program in accordance with Federal and State CDBG regulations and requirements.

Consulting Services will consist of the following tasks:

1. Consultant will provide underwriting of applications to the CDBG program.

2. Consultant will provide ongoing technical services to the SETRPC on an as-needed basis. Technical services may include site visits during the term of the contract.

3. Consultant will provide training to SETRPC staff and such other persons as required.

Frequency:

SETRPC anticipates three to four underwritings each calendar year. SETRPC will require technical assistance on an as needed basis.

Reimbursement:

SETRPC will pay between $800 and $1,600 for underwriting services depending on deal requirements. SETRPC will pay a billable rate of $110 per hour for technical services not to exceed sixty thousand ($60,000) dollars for labor and expenses. Terms are 30 days net.

Minimum Qualifications:

1. HUD Certified HOME Regulations Specialist

a. Copy of Certificate or letter from US Department of Housing & Urban Development must be included in response

2. Minimum ten years experience with the CDBG program

a. Shown on applicant's resume

3. Minimum five years experience in underwriting and/or development of multifamily projects, including low income housing tax credit developments

a. Shown on applicant's resume

Response Date:

Please respond by November 30, 2009.

Respond To:

If your company is interested and qualified to provide professional services to the SETRPC, please send your proposal to Jennifer Barclay via letter or e-mail. Proposals will need to include your company's qualifications and resume(s) and are due by 4:00 p.m. CST on November 30, 2009. Contact information is as follows:

South East Texas Regional Planning Commission

Attn: Jennifer Barclay

2210 Eastex Freeway

Beaumont, TX 77703

(409) 899-8444 Ext 6305

jbarclay@setrpc.org

TRD-200904760
Jennifer Barclay
Legal Contract Specialist
South East Texas Regional Planning Commission
Filed: October 19, 2009

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The Texas A&M University System

Notice of Award

In accordance with the provisions of Texas Government Code, Chapter 2254, Tarleton State University has entered into a consulting contract for development of a comprehensive enrollment management plan.

The consultant will assist in the development of a comprehensive enrollment management plan phased over approximately three years and three months.

The Name and Address of Consultant is as follows: Noel-Levitz, Inc., 2350 Oakdale Blvd., Coralville, IA 52241.

Tarleton State University will pay a total amount of $565,072.00, plus actual travel expenses, over the contract period. The contract will begin on September 30, 2009 and shall terminate on December 31, 2012 unless terminated earlier pursuant to the terms set forth in the contract.

Any questions regarding this posting should be directed to: Beth Chandler, Director of Purchasing, Tarleton State University, 201 St. Felix Street, Stephenville, TX 76401, Voice (254) 968-9611, E-mail: chandle@tarleton.edu.

TRD-200904774
Donna Harrell
Buyer
The Texas A&M University System
Filed: October 20, 2009

♦ ♦ ♦

University of North Texas

Notice of Invitation for Consultants to Provide Offers of Consulting Services Related to Technology Enhanced Education Techniques for Grant Funded Projects

Pursuant to the provisions of Texas Government Code, Chapter 2254, the University of North Texas (UNT) extends this invitation (Invitation) to qualified and experienced consultants interested in providing the consulting services described in this Invitation to the University of North Texas.

Scope of Work:

The selected firm will be responsible for assisting UNT with advice and guidance regarding curriculum development, comparative evaluation, research findings and dissemination, related to technology enhanced education techniques.

Specifications:

Any consultant submitting an offer in response to this Invitation must provide the following: (1) the consultant's legal name, including type of entity (individual, partnership, corporation, etc.) and address; (2) background information regarding the consultant, including the number of years in business and the number of employees; (3) information regarding the qualifications, education, and experience of the team members proposed to conduct the requested services; (4) the hourly rate to be charged for each team member providing services; (5) the earliest date by which the consultant could begin providing the services; (6) a list of five client references, including any complex institutions or systems of higher education for which the consultant has provided similar consulting services; (7) a statement of the consultant's approach to providing the services described in the Scope of Work section of this Invitation, any unique benefits the consultant offers UNT, and any other information the consultant desires UNT to consider in connection with the consultant's offer; (8) information to assist UNT in assessing the consultant's demonstrated competence and experience providing consulting services similar to the services requested in this Invitation; (9) information to assist UNT in assessing the consultant's experience performing the requested services for other complex institutions or sys-

tems of higher education; (10) information to assist UNT in assessing whether the consultant will have any conflicts of interest in performing the requested services; (11) information to assist UNT in assessing the overall cost to UNT for the requested services to be performed; and (12) information to assist UNT in assessing the consultant's capability and financial resources to perform the requested services.

Selection Process:

The consulting services sought herein do relate to services previously provided to UNT by Dr. Gibson. UNT intends to award the contract for the consulting services to Dr. David Gibson.

Selection of the Successful Offer (defined below) submitted in response to this Invitation by the Submittal Deadline (defined below) will be made using the competitive process described below. After the opening of the offers and upon completion of the initial review and evaluation of the offers submitted, selected consultants may be invited to participate in oral presentations. The selection of the Successful Offer may be made by UNT on the basis of the offers initially submitted, without discussion, clarification or modification. In the alternative, selection of the Successful Offer may be made by UNT on the basis of negotiation with any of the consultants. At UNT's sole option and discretion, it may discuss and negotiate all elements of the offers submitted by selected consultants within a specified competitive range. For purposes of negotiation, a competitive range of acceptable or potentially acceptable offers may be established comprising the highest rated offers. UNT will provide each consultant within the competitive range with an equal opportunity for discussion and revision of its offer. UNT will not disclose any information derived from the offers submitted by competing consultants in conducting such discussions. Further action on offers not included within the competitive range will be deferred pending the selection of the Successful Offer, however, UNT reserves the right to include additional offers in the competitive range if deemed to be in its best interest. After the submission of offers but before final selection of the Successful Offer is made, UNT may permit a consultant to revise its offer in order to obtain the consultant's best final offer. UNT is not bound to accept the lowest priced offer if that offer is not in its best interest, as determined by UNT. UNT reserves the right to: (a) enter into agreements or other contractual arrangements for all or any portion of the Scope of Work set forth in this Invitation with one or more consultants; (b) reject any and all offers and re-solicit offers; or (c) reject any and all offers and temporarily or permanently abandon this procurement, if deemed to be in the best interest of UNT.

Criteria for Selection:

The successful offer (Successful Offer) must be submitted in response to this Invitation by the Submittal Deadline will be the offer that is the most advantageous to UNT in UNT's sole discretion. Offers will be evaluated by University of North Texas personnel. The evaluation of offers and the selection of the Successful Offer will be based on the information provided to UNT by the consultant in response to the Specifications section of this Invitation. Consideration may also be given to any additional information and comments if such information or comments increase the benefits to UNT. The successful consultant will be required to enter into a contract acceptable to UNT.

Consultant's Acceptance of Offer:

Submission of an offer by a consultant indicates: (1) the consultant's acceptance of the Offer Selection Process, the Criteria for Selection, and all other requirements and specifications set forth in this Invitation; and (2) the consultant's recognition that some subjective judgments must be made by UNT during this Invitation process.

Finding by President:

The President of the University of North Texas finds that the consulting services are necessary because the University of North Texas does not have the specialized experience or the staff resources available to support existing and proposed programs of the University of North Texas. The University of North Texas believes that such expert consulting services will be cost effective, as they will provide expertise in the requirements for facilitating a successful project and in the reduction of the cost for teacher training and development.

Submittal Deadline:

To respond to this Invitation, consultants must submit the information requested in the Specification section of this Invitation and any other relevant information in a clear and concise written format to: Carrie Stoeckert, Assistant Director of PPS, University of North Texas, 2310 North Interstate 35-E, 1155 Union Circle #310499, Denton, Texas 76203. Offers must be submitted in an envelope or other appropriate container and the name and return address of the consultant must be clearly visible. All offers must be received at the above address no later than 4:00 p.m., CST, Monday, November 30, 2009 (Submittal Deadline). Submissions received after the Submittal Deadline will not be considered.

Questions:

Questions concerning this Invitation should be directed to: Carrie Stoeckert, Assistant Director of PPS, University of North Texas, 2310 North Interstate 35-E, 1155 Union Circle #310499, Denton, Texas 76203, (940) 565-3200, carries@unt.edu. UNT may in its sole discretion respond in writing to questions concerning this Invitation. Only UNT's responses made by formal written addenda to this Invitation shall be binding. Oral or other written interpretations or clarifications shall be without legal effect.

TRD-200904779
Carrie Stoeckert
Assistant Director of PPS
University of North Texas
Filed: October 20, 2009

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Sam Houston State University

Notice of Intent to Seek Consultant Services

In compliance with Chapter 2254, Texas Government Code, Sam Houston State University furnishes this notice of Request for Proposal (RFP). Sam Houston State University Seeks proposals from qualified consulting firms to provide Banner ERP project management and implementation support for third party integrations, Banner functional modules and technical consultants. The President of Sam Houston State University has made the finding of fact that the consulting services are necessary. Sam Houston State University does not currently have the in-house expertise to complete this project.

An award will be made to the proposer that submits the highest ranked proposal based on the evaluation criteria developed by the University and included in the RFP.

Parties interested in a copy of the RFP should contact:

Dan Fry

Procurement and Business Services

Sam Houston State University

Box 2028

Huntsville, Texas 77341

Voice: (936) 294-1941

E-mail: pur_djf@shsu.edu

The proposal submission deadline will be Friday, November 20, 2009 at 3:00 p.m. Central Prevailing Time.

The approximate beginning date of the contract will be on or about December 1, 2009 and will continue initially through August 31, 2010 with an option to renew annually up to 3 additional years.

TRD-200904802
John Hitzeman
Director of Procurement and Business Services
Sam Houston State University
Filed: October 21, 2009

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 34 (2009) is cited as follows: 34 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "34 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 34 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).